No. 96-8732-CFY

Title: Vincent Edwards, Reynolds A. Wintersmith, Horace Joiner, Karl V. Fort, and Joseph Tidwell, Petitioners
v.
United States

Docketed:
April 22, 1997

Court: United States Court of Appeals for the Seventh Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Apr 21 1997 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 23, 1997) |
| | May 15 1997 | Order extending time to file response to petition until June 23, 1997. |
| | Jun 18 1997 | Order further extending time to file response to petition until July 23, 1997. |
| | Jul 23 1997 | Brief of respondent United States filed. |
| | Aug 7 1997 | DISTRIBUTED. September 29, 1997 |
| | Oct 6 1997 | REDISTRIBUTED. October 10, 1997 |
| | Oct 14 1997 | REDISTRIBUTED. October 17, 1997 |
| | Oct 20 1997 | Petition GRANTED. limited to Question 1 presented by the petition.<br>SET FOR ARGUMENT February 23, 1998.<br>********** |
| | Oct 24 1997 | Motion of petitioner Vincent Edwards for appointment of counsel filed. |
| | Nov 3 1997 | DISTRIBUTED. November 7, 1997 (Page 17) |
| | Nov 7 1997 | Motion of petitioner Karl V. Fort for appointment of counsel filed. |
| | Nov 10 1997 | Motion for appointment of counsel GRANTED and it is ordered that J. Michael McGuinness, Esquire, of Elizabethtown, North Carolina, is appointed to serve as counsel for the petitioner Vincent Edwards in this case. |
| | Nov 12 1997 | DISTRIBUTED. November 26, 1997 (Page 16) |
| | Nov 14 1997 | Motion of petitioner Joseph Tidwell for appointment of counsel filed. |
| | Nov 20 1997 | Order extending time to file brief of petitioner on the merits until December 17, 1997. |
| | Nov 21 1997 | Motion of petitioner Reynolds Wintersmith for appointment of counsel filed. |
| | Dec 1 1997 | Motion for appointment of counsel GRANTED and it is ordered that Steven Shobat, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner Karl V. Fort in this case. |
| | Dec 1 1997 | DISTRIBUTED. December 1, 1997 (Page 13) |
| | Dec 8 1997 | Motion for appointment of counsel GRANTED and it is ordered that Robert A. Handelsman, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner Joseph Tidwell in this case. |
| | Dec 8 1997 | Motion for appointment of counsel GRANTED and it is ordered that Mark D. DeBofsky, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner Reynolds Wintersmith in this case. |

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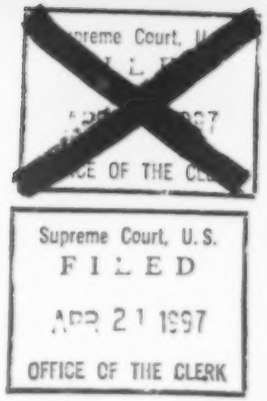
No. 96-8732-CFY

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Dec 17 1997 | Brief of petitioners Vincent Edwards, et al. filed. |
| | Dec 17 1997 | Joint appendix filed. |
| | Dec 17 1997 | Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. |
| | Dec 22 1997 | Motion of petitioner Joseph Tidwell to reconsider order denying certiorari on Question 2 filed. |
| | Dec 24 1997 | Motion of petitioner Horace Joiner for appointment of counsel filed. |
| | Dec 30 1997 | Record filed. |
| | Dec 30 1997 | Response of United States to motion of petitioner Tidwell for reconsideration of Question 2 of petition filed. |
| | Jan 5 1998 | DISTRIBUTED. January 9, 1998 (Page 40) |
| | Jan 7 1998 | Record filed. |
| | Jan 8 1998 | Order extending time to file brief of respondent on the merits until January 23, 1998. |
| | Jan 12 1998 | Motion for appointment of counsel GRANTED and it is ordered that Donald P. Sullivan, Esquire, of Rockford, Illinois, is appointed to serve as counsel for the petitioner Horace Joiner in this case. |
| | Jan 12 1998 | DISTRIBUTED. January 16, 1998 (Page 17) |
| | Jan 14 1998 | CIRCULATED. |
| | Jan 20 1998 | Further consideration of the motion of petitioner Joseph Tidwell to reconsider order denying certiorari on Question 2 is deferred. |
| | Jan 23 1998 | Brief of respondent United States filed. |
| | Feb 13 1998 | Reply brief of petitioner Karl V. Fort filed. |
| | Feb 23 1998 | ARGUED. |

96-8732

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997




No.

VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH,
HORACE JOINER, AND JOSEPH TIDWELL
Petitioners,

v.

ORIGINAL

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STEVEN SHOBAT
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Suite 1275
Chicago, Illinois 60604
(312) 922-8480
Counsel of Record

April 16, 1997

3 APP (9)

## QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant found guilty of a dual object narcotics conspiracy, based on a general jury verdict which does not disclose the object of the conspiracy of which the jury found the defendant guilty, must be sentenced on the basis of the criminal objective carrying the lesser penalty or be given a new trial?

2. Whether a defendant may be found guilty of using a firearm during and in relation to the commission of a drug offense when the government failed to elicit evidence from which a jury could find that the firearm was within the defendant's reach and available for immediate use?



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

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No.

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VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH,
HORACE JOINER, AND JOSEPH TIDWELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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The petitioners, Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which was entered in the above-entitled case on January 30, 1997.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled United States v. Vincent Edwards, et al., is reported at 105 F.3d 1179 (7th Cir. 1997), and is included in the appendix attached hereto at page A-1.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). On January 30, 1997, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of the district court in the case of United States v. Vincent Edwards, 105 F.3d 1179 (7th Cir. 1997). Petitioners did not seek a petition for rehearing.

## CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . . deprived of life, liberty, or property, without due process of law . . . .

The sixth amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed.

## STATEMENT OF THE CASE

**Issue One (All Petitioners)**

The petitioners were all charged with conspiring to possess with intent to distribute controlled substances, cocaine and cocaine base, in violation of Title 21, United States Code, Section 846. (R.357). In addition, petitioners Vincent Edwards, Reynolds Wintersmith, and Joseph Tidwell were each charged with one count of distributing a minute quantity of cocaine base in violation of Title 21, United States Code, Section 841(a)(1). (R.357). Finally, petitioner Joseph Tidwell was charged with using a firearm during and in relation to a narcotics offense in violation of Title 18, United States Code, Section 924(c). (R.357).

The petitioners were indicted in the Northern District of Illinois, Western Division on June



27, 1993 with fifteen other individuals and were charged with conspiring to distribute cocaine base and cocaine. The petitioners were alleged to have been participants in an agreement to sell street quantities of cocaine and cocaine base in the Rockford, Illinois area through the operation of several drug houses. (R.357).

On April 12, 1994, United States District Judge Philip G. Reinhard granted the petitioners' motions for severance and grouped the indicted defendants into three separate trials. (R.711; R.712). The petitioners in this case were grouped together and tried at the second of three trials. The jury returned a verdict of guilty against all of the petitioners on all counts in which they were named. (R. 984 -989).

Count One of the superseding indictment charged the defendants with conspiring to "possess with intent to distribute and to distribute cocaine and cocaine base" in violation of Title 21, United States Code, Section 846. (R. 357). Count One of the superseding indictment thus charged in a single count a conspiracy with two separate criminal objectives: possessing with intent to distribute and to distribute cocaine and possessing with intent to distribute and to distribute cocaine base. The indictment charged the two different objectives in the conjunctive using the term "and" between the two identified narcotic drugs. (R. 357).

The jury returned a general verdict and signed a general verdict form simply finding the defendants guilty "of the offense charged in Count One." (R. 986-995). No special verdict form nor special interrogatory was tendered to the jury (and none was requested by trial counsel for the defendants or for the government) so that it could identify for the Court and the parties which of the two conspiratorial objectives it found each of the defendants to have committed. Thus, there was simply no way of knowing from the general verdict which of the two conspiratorial objectives the jury

found the defendants guilty of in Count One of the indictment.

Considerable testimony at trial focused on the wholesale supply of kilogram quantities of powder cocaine, particularly during the earlier days of the conspiracy prior to the introduction of cocaine base. (Tr. 789-99). Even when the members of the drug conspiracy began to concentrate on the distribution of cocaine base, significant evidence demonstrated that the search for additional sources of wholesale quantities of powder cocaine continued until the end of the conspiracy. (Tr. 851-93). In addition to this wholesale drug operation, the retail operation began exclusively as a powder cocaine operation. It was not until sometime in the summer of 1992 that crack cocaine began to be packaged and distributed in small quantities known as dime bags through the drug conspiracy's distribution organization. (Tr. 871-76). Even while the crack cocaine operation was occurring, the powder distribution continued unabated. (Tr. 925)(selling of "weight" or larger quantities of cocaine). Evidence of the drug seizures by law enforcement officers involved most often powder cocaine and powder cocaine residue; the seizures of crack cocaine were less frequent but nonetheless present. (Tr. 512; 1500; 1530; 1605)(powder cocaine); (Tr. 530; 595; 671)(cocaine base). In light of this evidence, showing both conspiratorial objectives being performed at different times during the charged conspiracy and simultaneously, the jury could have believed that any particular defendant was involved in the powder cocaine conspiracy, the cocaine base conspiracy, or perhaps both.

The court's instructions to the jury did not distinguish between the conspiratorial objectives. The court advised the jury that the defendants were charged with "conspiring to possess with intent to distribute and to distribute cocaine and cocaine base." (Tr. 3032). The court further advised the jury that in order to find the defendants guilty of Count One, the government had to demonstrate beyond a reasonable doubt that "the conspiracy existed and, second, that the defendant knowingly



and intelligently [sic] became a member of the conspiracy," without specifying which conspiracy. (Tr. 3038). Further the court told the jury that any particular defendant "need not join at the beginning or know all the other members or the means by which the [unlawful] purpose was to be accomplished." (Tr. 3039).

With regard to the controlled substance involved, the court told the jury "as a matter of law that cocaine and cocaine base are Schedule II Narcotic Drug Controlled Substances." (Tr. 3040.) Further, the jury was advised that the government need not prove an exact amount of cocaine or cocaine base was involved in the conspiracy but only that the conspiracy involved "measurable amounts of cocaine or cocaine base." (Tr. 3040)(emphasis added). The jury was also advised that the conspiracy charged in Count One, "conspiracy to possess with intent to distribute cocaine and cocaine base" was a drug trafficking crime. (Tr. 3040). No objection was made to these instructions.

Thus, the instructions provided to the jury on the conspiracy charge did not distinguish, either in the definition of conspiracy or in the requirements of the government's proof, the cocaine base conspiracy from the cocaine conspiracy. Moreover, the court repeatedly emphasized that two different drugs were involved and that the jury could convict the defendants of the conspiracy if measurable amounts of either drug were involved since both substances were Schedule II Narcotic Drug Controlled Substances. In light of these instructions, the jury's general verdict of guilty could reflect its finding that the individual defendants solely possessed cocaine with intent to distribute, solely possessed cocaine base with intent to distribute, or did both. Absent a special verdict form or an interrogatory designed to elicit this information, there was simply no method to determine the jury's finding regarding which conspiratorial objective it unanimously found each defendant to have engaged in with at least one other person.

Two of the petitioners, Karl V. Fort and Reynolds A. Wintersmith were sentenced to life imprisonment because the sentencing judge determined that cocaine base was the object of the conspiracy. Petitioner Wintersmith had no criminal history prior to his conviction for this offense. The remaining three petitioners were sentenced to long terms of imprisonment: 28 years, 10 years, and 10 years in the custody of the Bureau of Prisons. Had the sentencing proceeded in accordance with a verdict based on the powder cocaine guidelines, no life sentences without parole could have been imposed, and the sentences of the three other petitioners would have been significantly lower.

**Issue Two (Petitioner Joseph Tidwell)**

Petitioner Joseph Tidwell was charged with conspiracy to distribute cocaine, a substantive count of possession of cocaine with intent to distribute, and using or carrying a gun during the commission of a drug offense. 18 U.S.C. § 924(c). Tidwell was convicted on all counts. The conviction for using or carrying a gun during the commission of a drug offense is at issue on this petition.

Rockford, Illinois, police officer Thomas Villa testified that he "was on routine patrol" in a housing project when he observed a car "driving through the housing projects without any lights on." Villa activated his Mars light and "attempted to stop the vehicle." "The vehicle did not stop. It continued driving through the housing authority." Villa activated his siren and all of his "emergency lights." The vehicle Villa was following left the housing project. Villa followed it for six or seven blocks during which time it made three turns. (Tr. 2020-2022).

Officer Villa observed the driver "throw a white piece of paper" out of the car. Villa radioed the address where the paper was thrown out. The vehicle was eventually curbed with the assistance of "numerous other ... backup officers." The driver, petitioner Joseph Tidwell, was removed at



gunpoint and Villa "subsequently found a .45 automatic handgun inside the glove compartment of the car." Villa recovered "the white piece of paper, which was a napkin, and inside the napkin was ... rock cocaine" packaged in several little plastic bags. The material in the plastic bags was cocaine. (Tr. 2022-2023, 2024, 2025-2026, 2032, 2047-53).

There was no evidence offered by the Government as to whether the glove compartment in which the gun was found was unlocked or any other evidence which would indicate that the gun was readily accessible. The District Judge instructed the jury, without objection, that to find Tidwell guilty of using or carrying a gun during the course of a drug offense, it would have to conclude that he was involved in the conspiracy or committed the substantive offense and that he "knowingly used or carried a firearm during and in relation to" the conspiracy or the substantive offense. (Tr. 3044). The jury returned its verdict on July 18, 1994. (Tr. 3079).

## REASONS FOR GRANTING THE WRIT

**Issue One (All Petitioners)**

I. The Seventh Circuit's Decision Created a Clear and Irreconcilable Conflict Between Its Decision and that of at Least Five Other Federal Courts of Appeals on the Effect of General Verdicts in Dual or Multiple Object Conspiracies.

The decision of the United States Court of Appeals for the Seventh Circuit in this case is in direct conflict with the decisions of at least five other courts of appeals to consider the precise issue raised in this petition. The conflicting decisions of other circuits reveal that this Court alone can settle the conflict. The Seventh Circuit's decision is also in direct conflict with other courts of appeals on the general resolution of ambiguities of dual object conspiracies not involving narcotics but involving other federal offenses, such as firearms. Finally, the Seventh Circuit's decision impacts an important issue which frequently arises in criminal prosecutions, which, if left to stand, will result in grossly disparate treatment of individuals who have been convicted of identical crimes.

Prior to the Seventh Circuit's ruling in this case, five courts of appeals had confronted the issue raised in the petitioners' case: where a jury returns a general verdict to a charge that a defendant participated in a conspiratorial agreement covering different kinds of drugs or different conspiratorial objectives, and the punishment a defendant may receive varies depending on the jury's precise finding regarding which conspiratorial objective a defendant has agreed to participate in, must a defendant be sentenced on the drug or conspiratorial objective carrying the lesser punishment. All five of these circuits reached the same conclusion: in cases in which an indictment charges multiple conspiratorial objectives, and the jury verdict does not reveal the jury's finding regarding which objective it found beyond a reasonable doubt, the defendant must be sentenced on the objective carrying the lesser punishment or must be afforded a new trial. United States v. Orozco-Prada, 732 F.2d 1076, 1083-84



(2d Cir. 1984); Newman v. United States, 817 F.2d 635 (10th Cir. 1987); United States v. Owens, 904 F.2d 411, 414-15 (8th Cir. 1990); United States v. Bounds, 985 F.2d 188, 194-95 (5th Cir. 1993); United States v. Garcia, 37 F.3d 1359, 1369-71 (9th Cir. 1994).

For example, in United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994), the Ninth Circuit held that a defendant charged and convicted in a single count with a conspiracy to violate Title 21, United States Code, Section 841(a)(1) (possession with intent to distribute) and Section 843 (use of a telephone to further drug conspiracy) had to be sentenced on the basis of the count carrying the lesser punishment. The possession charge carried a maximum penalty of fifteen years imprisonment while the telephone count carried only a four year term. The jury returned a general verdict as to the conspiracy count. The Ninth Circuit concluded there was no way to determine which conspiratorial objective the jury found the defendants had committed by its general verdict of guilty; absent a special verdict form or a special interrogatory, the general verdict of guilty could have supported the lesser charge or the greater charge. Therefore, the district court's sentence of fifteen years could not be supported because it exceeded the permissible punishment of four years for the use of the telephone violation.

Moreover, as the Ninth Circuit noted, "[t]he sentencing court cannot speculate as to which object of the conspiracy the jury found to support the conviction. To do so would invade the province of the jury." Garcia, 37 F.3d at 1370. The Ninth Circuit rested its reasoning on the sixth amendment requirement of a right to trial by jury. Only a jury determination of the conspiratorial objective would satisfy the constitutional requirement. "A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible

for a judge to direct a verdict for the State." Id. at 1370-71 (quoting Carella v. California, 491 U.S. 263, 268 (1989)).

The Seventh Circuit confronted with the identical issue which confronted these other circuits reached the opposite conclusion. The Seventh Circuit held that where a jury returns a general verdict to drug conspiracy charge which names two different conspiratorial objectives -- either different drugs or different drug violations -- there is no need for a special verdict form, a special interrogatory, or any special finding on the part of the jury because determinations regarding amounts and types of controlled substances are sentencing determinations for the judge and not for the jury. Edwards, 105 F.3d at 1180. The Seventh Circuit attempted to distinguish this line of authority by concluding that these decisions did not make a distinction between a conspiracy which alleged a violation of a single crime in two ways from a conspiracy which alleged a violation of two separate crimes. Id. at 1181-82. This distinction, however, has been expressly rejected by this Court and by other circuits in addressing dual object conspiracies based on drug offenses and regarding other federal offenses as well.

The Seventh Circuit's reasoning that the indictment is not ambiguous because it charges one object offense -- the possession with intent to distribute narcotics (cocaine and cocaine base) and a conspiracy to violate a single statutory violation, 21 U.S.C. §841(a)(1)-- and not more than one offense is in direct conflict with the reasoning of this Court's decision in United States v. Griffin, 502 U.S. 46, 49 (1991). In Griffin, the defendants were charged with one offense: conspiring to violate the laws of the United States, in violation of one statutory provision, 18 U.S.C.§ 371, by impairing and impeding a federal agency in the lawful performance of its duties. The conspiracy charged an impairment, however, of two federal agencies: the Drug Enforcement Administration and the Internal



Revenue Service. Yet this Court described this charge as a "multiple-object" conspiracy and went on to address the effect of a general verdict on a multiple object conspiracy. Id. Thus, the distinction the Seventh Circuit attempted to draw between a conspiracy which has as its objects two crimes as opposed to a conspiracy which has as its object violation of a single crime in two ways is inconsistent with the reasoning of Griffin.

Likewise, in United States v. Pace, 981 F.2d 1123, 1129 (10th Cir. 1993), the defendants were charged with a single statutory violation (21 U.S.C. § 846) and a single offense: distribution of methamphetamine and amphetamine. The Tenth Circuit, nonetheless, found the indictment to be a multiple-object conspiracy. The Tenth Circuit very recently reaffirmed its holdings on multiple conspiracies in United States v. Bush, 70 F.3d 557, 562 (10th Cir. 1995). In Bush, the defendant had entered a guilty plea to an indictment which charged the possession with intent to distribute crack (cocaine base) and cocaine. The Court concluded that these allegations raised two different conspiratorial objectives; the plea colloquy was thus subject to the same analysis as was the general jury verdict in its earlier decision in Pace. Id. at 563. Likewise, the First Circuit held in United States v. Melvin, 27 F.3d 710 (1st Cir. 1994), that a dual object conspiracy existed where the indictment charged firearms and machine guns under a single offense, 18 U.S.C. § 924(c). Thus, the reasoning employed by the Seventh Circuit to support its contrary holding, created conflicts with the reasoning in this Court's decision in Griffin and the reasoning of the Tenth and First Circuits in Pace and Melvin.

Only this Court can resolve this Circuit conflict. The Seventh Circuit did not attempt to reconcile the adverse decisions of its sister circuit courts. Nor did it attempt to distinguish the facts of those cases as it had attempted to do just months earlier in its decision in United States v. Banks,

78 F.3d 1190 (7th Cir. 1996). Instead, it recognized the direct conflict between its reasoning and that of the other circuits. The Seventh Circuit then went on to flatly state that the decisions of the majority of courts of appeals to address the precise issue were "wrong." Edwards, 105 F.3d at 1180.

In addition to the Seventh Circuit's recognition of the clear conflict and its certain view that its decision is correct, the Tenth Circuit's reasoning in its contrary view in Pace has been recently reaffirmed in its subsequent view in Bush decided in 1995. Thus, the courts of appeals are not likely to revisit the issue raised by this appeal soon or reverse their respective holdings. The clear conflict will in all likelihood persist unless this Court resolves the conflict one way or the other. Obviously, petitioners believe that the correct view is the one reached by the overwhelming majority of the courts of appeals to have addressed the issue.

In addition to creating a clear circuit conflict on the precise issue of dual object conspiracies in narcotics cases, the Seventh Circuit's reasoning conflicts with the holdings of other circuits in dual object conspiracies where the ambiguity was not simply two different drugs. In United States v. Melvin, 27 F.3d 710, 715 (1st Cir. 1994), the defendants were charged in a single count with a violation of using a firearm during and in relation to a crime of violence (an armed robbery) in violation of 18 U.S.C. § 924(c). The count of the indictment identified six separate firearms which were recovered from the vehicle driven to the robbery, four of which were handguns, and two of which were machine guns. Use of a machine gun during a crime of violence carried a minimum penalty of 30 years imprisonment consecutive to the sentence on the crime of violence while use of the ordinary handguns required the imposition of a five year sentence consecutive to the sentence imposed on the robbery conviction. The sentencing judge could not determine, because no special verdict form had been submitted to the jury, which of the six firearms the jury had determined the



defendants used in relation to the drug trafficking offense. The First Circuit upheld the district court's decision to sentence the defendants to the lesser of the two criminal objectives, imposing a five year consecutive sentence and not the thirty year sentence. Likewise, the Fourth Circuit Court of Appeals, in United States v. Quicksey, 525 F.2d 337, 341 (4th Cir. 1975) held that a special verdict was required where the defendants were charged with conspiracy based on 18, U.S.C. § 371 and conspiracy based on 21, U.S.C. § 846, because the five year maximum under Section 371 was far below the maximum sentence under Section 846.

Finally, the Seventh Circuit's decision creates a circuit conflict as to whether a special verdict form must be given in a dual object conspiracy cases where the punishment may substantially differ depending on the object of the conspiracy for which the defendant is convicted. The Seventh Circuit's decision below specifically noted that special verdict forms or special interrogatories should not be given in dual object conspiracy cases. Edwards, 105 F.3d at 1181. In so ruling, it noted its disagreement with the Eleventh Circuit's "preference" for giving such a special interrogatory or verdict to the jury. United States v. Dennis, 786 F.2d 1029, 1038-41 (11th Cir. 1986). This Court, however, has specially recommended the giving of special verdict forms in dual-objective conspiracy cases. Griffin, 502 U.S. at 61 (Blackmun, J., concurring). Other courts have required such verdict forms in dual object conspiracy cases. E.g., Garcia, 37 F.3d at 1370 ("when the information sought in a special verdict is relevant to the sentence to be imposed, it is the duty of the Government to seek a special verdict")(emphasis added). This conflict can only be resolved by this Court.

This Court should issue the writ of certiorari in this case because the issues raised in the petition are of grave importance. The issues frequently arise and are common in criminal prosecutions. The disparity in sentences based on particular findings of the jury is often quite great

as Congress has increasingly enacted harsher penalties for essentially similar conduct depending on particular variations. The conflict between the lower courts means that persons convicted of the same conduct in different regions in the country will be subjected to vastly different punishments merely because of the disparate interpretation of dual object conspiracies employed by the courts of appeals. Finally, the defendants in this case received significantly harsher sentences than they would otherwise have received had the Seventh Circuit followed the majority of circuits instead of developing its own interpretation of the proper rules in dual object conspiracies.

First, narcotics prosecutions are the single most common federal offense brought by federal prosecutors and heard by the United States District Courts today. Twenty six percent of all federal prosecutions initiated in 1995, the single largest group of any crimes, were for narcotics and dangerous drug offenses. [See Attachment B, at Table 4.7]. Twenty five percent of all cases pending before United States District Courts during 1995 were drug cases. Id. at Table 5.8 The number of court-authorized orders for interception of wire, oral, or electronic communications has continued to increase yearly, with 78.5% of all federal wiretaps being issued for narcotics investigations. (Tables 5.2 and 5.3). These types of investigations most readily are translated into prosecutions based on conspiracy violations, and often involve multiple objects -- either by naming different drugs or by identifying different statutory violations as objects of the conspiracy (such as using the telephone to facilitate a conspiracy 21 U.S.C.§843(b) and possessing with intent to distribute, 21 U.S.C.§841(a)(1)). These substantive statutory violations contain vastly different punishments as do the different illegal controlled substances. The indictment of petitioners in this case followed a court-authorized wiretap on petitioner Karl V. Fort's home telephone and grouped together persons intercepted on the telephone in a single conspiracy charging multiple narcotics. Thus, the federal



district courts and lower appellate courts will continue to confront questions of dual object conspiracies on a frequent and regular basis.

Second, Congress has enacted a statutory framework of punishments in the narcotics field that bases nearly the entirety of a defendant's sentence on the amount and type of drug the for which the defendant is found to be responsible. 21 U.S.C. §841(b). These disparate sentences are replicated in the sentencing guidelines enacted by the United States Sentencing Commission which, of course, are controlling on federal district court judges. U.S.S.G. §2D1. In many of the cases relied upon by the petitioners below, defendants convicted of multiple object conspiracies and sentenced on that objective which carried the higher punishment had their convictions reversed by the reviewing court with instructions that the defendants be afforded a new trial or be sentenced based on the objective carrying the lesser penalty. E.g. Melvin, 27 F.3d at 715; Pace, 981 F.2d at 1129; Garcia, 37 F.3d at 1363. In Melvin, the defendants' sentences of 30 years consecutive to the underlying offense were reduced to five years consecutive based simply on the difference between a penalty established by Congress for handguns as opposed to machineguns. In Pace, the difference between amphetamines and methamphetamine was the difference between at least two levels under the sentencing guidelines and potentially more. In Garcia, the difference between the criminal objectives meant the difference between four years imprisonment and fifteen years. The same potential disparity exists in firearms offenses, which base punishment on differing types of firearms, and in other offenses as well based on particular circumstances. See 18 U.S.C. §924 (a)(1) to (a)(5) (distinguishing punishments based on variety of sentencing factors); 18 U.S.C. §924(c)(1)(basing punishment on distinction between type of weapons used); 18 U.S.C.§1201 (punishment for kidnaping depends on harm to victim).

Third, the Seventh Circuit's decision means that these petitioners, had they committed their

offenses in any other circuit other than the Seventh would have had their sentences substantially reduced because the ratio of punishment under the sentencing guidelines based on quantities of cocaine to quantities of cocaine base are 100 to 1. Certainly for petitioners Karl V. Fort and Reynolds A. Wintersmith, who received life sentences without parole, the impact of the Seventh Circuit's decision could not be more significant. Had the offense been committed in any other circuit, they would not have received a life sentence. Unless this Court resolves the conflict between the circuits on the treatment of dual object conspiracies, these unwarranted and fundamentally unfair disparate sentences will continue to be imposed for conduct which in every respect is identical.

**Issue Two (Petitioner Joseph Tidwell)**

> II. The Seventh Circuit's decision Affirming the Section 924(c) Conviction was in Contravention of this Court's decision in Bailey v. United States, 116 S.Ct 501 (1995)

This Court's decision in Bailey v. United States, 116 S.Ct. 501 (1995), decided after Petitioner Joseph Tidwell was convicted, changed the criteria for conviction under 18 U.S.C. § 924(c)(1). Bailey's progeny requires the Government to prove the gun was "within the defendant's reach and available for immediate use." United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996); United States v. Baker, 78 F.3d 1241, 1247 (7th Cir. 1996). Tidwell submits that the Government did not and cannot prove that he "carried" the gun unless it establishes that the glove compartment was unlocked.

Tidwell strenuously argued the insufficiency of the evidence on the 924(c)(1) charge in his appeal to the Seventh Circuit. His supplemental authority contended, premised upon United States v. Robinson, 96 F.3d 246, 250 (7th Cir. 1996), that claims regarding the sufficiency of the evidence for a Section 924(c)(1) conviction obtained prior to Bailey , encompass the propriety of the pertinent



jury instruction. Tidwell's reply brief cited United States v. Kim, 65 F.3d 123 (9th Cir. 1995), for the point that a new trial is required where the elements of the crime are changed by an intervening judicial decision. However, the Seventh Circuit affirmed Tidwell's 924(c)(1) conviction without a discussion of any of these points. The opinion notes that "(a)rguments that are variations on contentions made to the panels in (appeals from convictions by severed co-indictees) we reject without additional verbiage. Many others we bypass because they do not affect the sentences." Edwards, 105 F.3d at 1180. However, 924(c)(1) provides for a five year sentence upon conviction which was to run consecutively to the convictions on the conspiracy and possession counts. (Tr. 1/18/95 at 113).

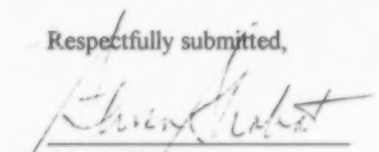
Since there is no discussion in the opinion of these issues, Tidwell cannot determine the basis for the affirmance. The Seventh Circuit has held in at least one post-Bailey case that it will not remand a Section 924(c)(1) conviction for a new trial if the evidence is sufficient for conviction under either the "use" or "carry" prongs of Section 924(c)(1) as interpreted by Bailey. If this was the unspecified reason for the affirmance, it is contrary to United States v. Gaudin, 115 S.Ct. 2310, 2313 (1995), which requires the jury to find all elements of the crime, and is contrary to United States v. Martin Linen Supply Co., 430 U.S. 564 at 572-573 (1977), which prohibits directed verdicts of guilt.

This case justifies Supreme Court review for two reasons: to require the lower courts to grant new trials in pre-Bailey Section 924(c) (1) convictions to enable the Government to prove that the gun was "within the defendant's reach and available for immediate use" and to hold that a new trial is required whenever the elements of a crime are changed by an intervening judicial decision and a court cannot take it upon itself to conclude that a properly instructed jury in such instances would render a guilty verdict.

## CONCLUSION

For the reasons noted herein, Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 30, 1997.

Respectfully submitted,



Steven Shobat
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## APPENDIX: ITEM A

**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Vincent EDWARDS, Reynolds A. Wintersmith, Horace Joiner, Karl V. Fort, and Joseph Tidwell, Defendants-Appellants.**

**Nos. 94-3805, 94-3833, 94-3952, 94-3953, 95-1358.**

United States Court of Appeals, Seventh Circuit.

Argued Dec. 2, 1996.

Decided Jan. 30, 1997.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Philip G. Reinhard, J., of conspiracy to distribute cocaine or cocaine base, and they appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that although general jury verdict did not specify whether defendants conspired to distribute cocaine or cocaine base, judge was not required to sentence defendants on assumption that all the drug had been powder cocaine.

Affirmed.

**1. Criminal Law ⇐749, 992**

**Although general jury verdict did not specify whether defendants conspired to distribute cocaine or cocaine base, judge was not required to sentence defendants on assumption that all the drug had been powder cocaine; under Sentencing Guidelines, judge alone determined which drug was distributed, and in what quantity. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. §§ 1B1.2(d), 1B1.2, comment. (n.5), 1B1.3, 18 U.S.C.A.**

**2. Drugs and Narcotics ⇐133**

**Judge may base sentence on kinds and quantities of drugs that were not considered by jury. U.S.S.G. § 1B1.3, 18 U.S.C.A.**

**3. Criminal Law ⇐1211**

**Because sentencing depends on proof by preponderance of evidence, while conviction depends on proof beyond reasonable doubt, judge may base sentence on events underlying charges for which jury returned verdict of acquittal. U.S.S.G. § 1B1.3, 18 U.S.C.A.**

---

Barry Rand Elden, Chief of Appeals, Office of the United States Attorney, Criminal Appellate Division, Chicago, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in Nos. 94-3805 and 94-3833.

J. Michael McGuinness (argued), Chicago, IL, for Vincent Edwards.

Mark D. DeBofsky, Steven Shobat (argued), Mark D. DeBofsky, Richard Q. Holloway, Debofsky & Debofsky, Chicago, IL, for Reynolds A. Wintersmith.

James T. Zuba, Keith C. Syfert, Office of the United States Attorney, Rockford, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in No. 94-3952.

Donald P. Sullivan (argued), Canfield, Canfield & Sullivan, Rockford, IL, for Horace Joiner.

Barry Rand Elden, Chief of Appeals, Office of the United States Attorney, Criminal Appellate Division, Chicago, IL, John G. McKenzie, Office of the United States Attorney, Rockford, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in No. 94-3953.

Steven Shobat (argued), Chicago, IL, for Karl V. Fort.

Barry Rand Elden, Chief of Appeals, Office of the United States Attorney, Criminal Appellate Division, Chicago, IL, John G. McKenzie, Keith C. Syfert, Office of the United States Attorney, Rockford, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in No. 95-1358.

Robert A. Handelsman (argued), Chicago, IL, for Joseph Tidwell.

Before CUMMINGS, EASTERBROOK, and ROVNER, Circuit Judges.



EASTERBROOK, Circuit Judge.

An indictment charged that 20 persons, affiliated with the Gangster Disciples street gang, distributed cocaine in and near Rockford, Illinois. The leaders of this ring called themselves "The Mob". Five pleaded guilty; the remaining 15 were tried in three groups. Other panels of this court have affirmed the convictions and sentences resulting from two of these trials. *United States v. Evans*, 92 F.3d 540 (7th Cir.1996); *United States v. Russell*, Nos. 94-4000 *et al.*, 1996 WL 508598 (7th Cir. Aug. 30, 1996) (unpublished order). After their convictions in the remaining trial, Karl V. Fort and Reynolds Wintersmith were sentenced to life in prison, Joseph Tidwell to 312 months, Horace Joiner to 126 months, and Vincent Edwards to 120 months. Arguments that are variations on contentions made to the panels in *Evans* and *Russell* we reject without additional verbiage. Many others we bypass because they do not affect the sentences. Precise calculations of drug quantity do not matter when the amounts are as large as they are here. Only one contention requires discussion: defendants' joint argument that the judge must sentence them as if all of the cocaine were cocaine hydrochloride (powder), because the jury's verdict does not unambiguously establish that they peddled any cocaine base (crack).

Count I of the indictment charged the defendants with conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The instructions told the jury that it could convict the defendants under Count I if it concluded that the conspiracy "involved measurable amounts of cocaine or cocaine base." The jury returned a verdict of guilty—which means, appellants insist, that the verdict does not establish that they distributed any crack, for the jury would have returned the same verdict had all of the drug been powder cocaine. Because, on this understanding, "there is simply no way of determining from the general verdict which of the conspiratorial objectives the jury found beyond a reasonable doubt" (Appellants' Joint Br. 33), appellants ask us to require the prosecutor to elect between a new trial and resentencing on the assumption that all of the cocaine was powder. Defendants did not object to this part of the instructions or the verdict form, and they did not ask the court to elicit from the jury the information they now say is missing, so they argue now that the district court committed plain error. See *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Five courts of appeals have held that, when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendants must be sentenced as if the organization distributed only the drug carrying the lower penalty. *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.1984); *Newman v. United States*, 817 F.2d 635 (10th Cir.1987); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir.1990); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir.1993); *United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir.1994). *Newman* held that the shortcoming it identified is "plain error." 817 F.2d at 637 n. 3; see also *United States v. Pace*, 981 F.2d 1123, 1128 (10th Cir.1992). We believe that all of these decisions are wrong. There was no error, and hence no plain error, in this case.

[1-3] Our reason is simple: under the Sentencing Guidelines, the judge alone determines which drug was distributed, and in what quantity. *Witte v. United States*, —— U.S. ——, ——, 115 S.Ct. 2199, 2207-08, 132 L.Ed.2d 351 (1995); *United States v. Cooper*, 39 F.3d 167, 172 (7th Cir.1994); *United States v. Levy*, 955 F.2d 1098, 1106 (7th Cir.1992); U.S.S.G. § 1B1.2(d) & Application Note 5. The "relevant conduct" rule requires the judge to consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment. U.S.S.G. § 1B1.3; *United States v. Watts*, —— U.S. ——, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. White*, 888 F.2d 490 (7th Cir.1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 8-12, 25-28 (1988). A judge therefore may base a sentence on kinds and quantities of drugs that were not considered by the jury. *United States v. Garcia*, 69 F.3d 810, 818-19 (7th Cir.1995);

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2d Cir.1984); *Newman v.*
7 F.2d 635 (10th Cir.1987);
*Owens*, 901 F.2d 411, 414–15
*nited States v. Rounds*, 985
5 (5th Cir.1993); *United*
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*United States v. Montgomery*, 14 F.3d 1189, 1196–98 (7th Cir.1994); *United States v. Villarreal*, 977 F.2d 1077, 1080 (7th Cir.1992). Because sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal. *Watts, supra*. What a jury believes about which drug the conspirators distributed therefore is not conclusive—and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options.

*Orozco-Prada*, first in the line of contrary decisions, relied on a series of cases that address a different problem. Suppose the indictment charges that the defendants conspired to commit two crimes—say, bank robbery and money laundering—that have different maximum punishments. Because the punishment for conspiracy depends on the punishment for the substantive offense, 18 U.S.C. § 371; 21 U.S.C. § 846, a disjunctive verdict form (or a disjunctively phrased indictment) leaves unresolved the question whether the conspirators pursued both objectives and, if only one, which. The judge does not have authority to sentence the defendants to 20 years (the bank robbery maximum) if they conspired only to launder the proceeds of someone else's robbery. So unless the prosecutor consents to a sentence based on the lower maximum punishment, there must be a new trial. See *Brown v. United States*, 299 F.2d 438 (D.C.Cir.1962) (Burger, J.), among the several similar cases cited by *Orozco-Prada*, 732 F.2d at 1083–84. *Brown* and its successors reach an entirely sensible result but have nothing to do with an indictment that charges the defendants with agreeing to commit *one crime* in *two ways*. Powder and crack cocaine are variations of the same drug sold to distinct segments of the retail market; the difference has consequences for sentencing under 21 U.S.C. § 841(b) and the Guidelines, but not for the identification of the substantive offense. Cf. *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *Neal v. United States*, — U.S. ——, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Section 841(a)(1) makes it unlawful "to manufacture, distribute, or dispense, or to possess with intent to manufacture, distribute or dispense, a controlled substance". That is the crime these five defendants conspired to commit. Application of the disparate sentencing rules for different types and quantities of controlled substances is for the judge rather than the jury. This is why it is unnecessary for the indictment to charge how much of a drug was involved, even though quantity matters greatly to the sentence. An indictment could charge the defendants with "conspiring to distribute controlled substances in violation of 21 U.S.C. § 841(a)" without identifying either the substances or the quantities. Defendants might well prefer this form of charge, if the alternative is multiple conspiracies for multiple drugs, with cumulative punishments. Cf. *United States v. Duff*, 76 F.3d 122 (7th Cir. 1996). If the grand jury specifies details, the proof and the jury charge may not depart from them in a way that constructively amends the indictment. Compare *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), with *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). See also *United States v. Leichtnam*, 948 F.2d 370, 378–81 (7th Cir. 1991). But the indictment here identified both powder and crack; defendants do not argue variance.

*Orozco-Prada* did not mention the difference between conspiracy to commit two crimes, and conspiracy to commit one crime in two ways. It therefore applied the *Brown* principle uncritically. *Newman* relied on both *Brown* and *Orozco-Prada*, again without making the distinction. Neither *Orozco-Prada* nor *Newman* mentioned the difference between the jury's and the judge's roles. *Newman* even concluded that "the uncertainty taints the conviction itself" (817 F.2d at 639) and remanded for a new trial—a position since disapproved by *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), and inconsistent with our conclusion in *United States v. Peters*, 617 F.2d 503 (7th Cir.1980), which the tenth circuit declined to follow, 817 F.2d at 638. Finally, *Owens*, *Rounds*, and *Garcia* relied on *Orozco-Prada* and *Newman* without independent analysis.

In *United States v. Banks*, 78 F.3d 1190, 1201–04 (7th Cir.1996), we held (following *Peters*) that there is no problem when the instructions are phrased in the conjunctive, for then the jury necessarily finds that the defendants distributed all of the drugs identified in the indictment. Now we add that there is no problem when the instructions are phrased in the disjunctive, because (subject to the variance possibility discussed above) as long as the jury finds that the defendants conspired to distribute *any* drug proscribed by § 841(a)(1), the judge possesses the power to determine which drug, and how much. Our conclusion has the support of holdings in the eleventh circuit, see *United States v. Williams*, 876 F.2d 1521, 1525 (11th Cir.1989); *United States v. Dennis*, 786 F.2d 1029, 1038–41 (11th Cir.1986), although not of all the language in these opinions. *Dennis* expressed a preference for obtaining a special verdict from the jury—and even so was disapproved by *Newman* for holding that the judge could make an independent decision about the type and quantity of drugs involved—but we see no reason to put an extra question to the jurors, whose tasks are complex enough when trying to address the questions that the law commits to them. *Williams* could perhaps be distinguished on the ground that it involved a request for a lesser-included-offense instruction, but its holding—that the defendant is not entitled to this instruction, because distributing powder cocaine cannot be a lesser included offense of distributing cocaine base when the two are the *same* offense—establishes the same principle on which we rely. Whether the conspiracy deals different drugs or different forms of the same drug is not pertinent. A charge that the conspirators agreed to distribute marijuana, cocaine, and heroin identifies only a single crime—for the conspiracy is the *agreement* and not the distribution, see *United States v. Shabani*, 513 U.S. 10, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994)—and the judge is free to determine after the verdict which penalty is appropriate in light of the types and quantities of drugs handled. A conflict among the circuits was apparent after the tenth circuit's disapproval, in *Newman*, of decisions from the seventh (*Peters*) and eleventh (*Dennis*), and may well have been implicit in our decisions about the allocation of authority between judge and jury. But because our decision makes the scope of the conflict so clear, we have circulated this opinion to all active judges under Circuit Rule 40(e). A majority did not favor a hearing en banc. Circuit Judge Ripple voted in favor of hearing this case en banc.

AFFIRMED.



**Aaron D. WEINBERGER, as administrator of the Estate of Jeremiah Benjamin Weinberger, Aaron David Weinberger, as father of Jeremiah Benjamin Weinberger, Plaintiff–Appellant,**

**v.**

**STATE OF WISCONSIN, Donna Chester, Probation Officer and as yet unnamed probation officers and employees, Defendants–Appellees.**

**No. 95–3398.**

United States Court of Appeals, Seventh Circuit.

Argued April 18, 1996.

Decided Jan. 31, 1997.

Parent of victim of cannibalistic serial killer brought § 1983 civil rights action and state claim against killer's probation officer, alleging that officer's failure to conduct home visit caused victim's death. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, 906 F.Supp. 485, granted summary judgment for defendant. Plaintiff appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) defendant was not reckless, and so was not liable in civil rights action, and (2) plaintiff failed to file timely notice of claim

# APPENDIX: ITEM B

Table 4.7

**Arrests**

By offense charged and age, United States, 1994

(10,654 agencies; 1994 estimated population 207,624,000)

| Offense charged | Total all ages | Ages under 15 | Ages under 18 | Ages 18 and older | Under 10 | 10 to 12 | 13 to 14 | 15 | 16 | 17 | 18 | 19 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Total | 11,877,188 | 780,979 | 2,209,675 | 9,667,513 | 37,130 | 176,289 | 567,560 | 428,697 | 489,089 | 510,640 | 520,831 | 505,122 |
| Percent[a] | 100.0% | 6.6 | 18.6 | 81.4 | 0.3 | 1.5 | 4.8 | 3.6 | 4.1 | 4.3 | 4.4 | 4.3 |
| Murder and nonnegligent manslaughter | 18,497 | 379 | 3,102 | 15,395 | 3 | 31 | 345 | 535 | 912 | 1,276 | 1,418 | 1,418 |
| Forcible rape | 29,791 | 1,863 | 4,859 | 24,932 | 103 | 442 | 1,318 | 892 | 993 | 1,111 | 1,217 | 1,158 |
| Robbery | 146,979 | 13,543 | 47,094 | 99,885 | 245 | 2,478 | 10,820 | 10,008 | 11,753 | 11,790 | 10,653 | 8,701 |
| Aggravated assault | 449,716 | 23,190 | 70,030 | 379,686 | 1,043 | 5,261 | 16,886 | 13,219 | 15,993 | 17,628 | 17,857 | 17,030 |
| Burglary | 319,926 | 47,481 | 115,681 | 204,245 | 3,135 | 11,833 | 32,513 | 22,232 | 23,413 | 22,555 | 20,223 | 15,889 |
| Larceny-theft | 1,236,311 | 185,611 | 412,349 | 823,962 | 9,145 | 51,765 | 124,901 | 76,459 | 77,418 | 72,661 | 62,806 | 49,702 |
| Motor vehicle theft | 166,260 | 21,867 | 73,265 | 92,995 | 206 | 2,592 | 19,069 | 17,986 | 18,087 | 15,325 | 11,698 | 8,718 |
| Arson | 16,764 | 6,289 | 9,268 | 7,496 | 1,153 | 2,041 | 3,095 | 1,224 | 964 | 791 | 531 | 488 |
| Violent crime[b] | 644,983 | 38,975 | 125,085 | 519,898 | 1,394 | 8,212 | 29,369 | 24,654 | 29,651 | 31,805 | 31,145 | 28,307 |
| Percent[a] | 100.0% | 6.0 | 19.4 | 80.6 | 0.2 | 1.3 | 4.6 | 3.8 | 4.6 | 4.9 | 4.8 | 4.4 |
| Property crime[c] | 1,739,261 | 261,448 | 610,563 | 1,128,698 | 13,639 | 68,231 | 179,578 | 117,901 | 119,882 | 111,332 | 95,258 | 74,797 |
| Percent[a] | 100.0% | 15.0 | 35.1 | 64.9 | 0.8 | 3.9 | 10.3 | 6.8 | 6.9 | 6.4 | 5.5 | 4.3 |
| Total Crime Index[d] | 2,384,244 | 300,423 | 735,648 | 1,648,596 | 15,033 | 76,443 | 208,947 | 142,555 | 149,533 | 143,137 | 126,403 | 103,104 |
| Percent[a] | 100.0% | 12.6 | 30.9 | 69.1 | 0.6 | 3.2 | 8.8 | 6.0 | 6.3 | 6.0 | 5.3 | 4.3 |
| Other assaults | 991,881 | 72,514 | 171,642 | 820,239 | 3,731 | 18,961 | 49,822 | 32,005 | 33,602 | 33,521 | 31,173 | 31,652 |
| Forgery and counterfeiting | 93,003 | 927 | 7,013 | 85,990 | 33 | 184 | 710 | 981 | 2,057 | 3,048 | 4,199 | 4,512 |
| Fraud | 330,752 | 4,409 | 18,594 | 312,158 | 127 | 657 | 3,625 | 4,082 | 4,120 | 5,983 | 8,969 | 11,896 |
| Embezzlement | 11,614 | 92 | 803 | 10,811 | 8 | 22 | 62 | 60 | 211 | 440 | 574 | 631 |
| Stolen property; buying, receiving, possessing | 134,930 | 10,751 | 36,218 | 98,712 | 240 | 1,890 | 8,621 | 7,376 | 8,714 | 9,377 | 9,690 | 8,078 |
| Vandalism | 259,579 | 60,250 | 122,085 | 137,494 | 6,074 | 17,782 | 36,394 | 21,415 | 21,381 | 19,039 | 13,965 | 11,017 |
| Weapons; carrying, possessing, etc. | 213,494 | 16,661 | 52,200 | 161,294 | 611 | 3,424 | 12,626 | 9,963 | 12,199 | 13,337 | 14,213 | 12,554 |
| Prostitution and commercialized vice | 86,618 | 120 | 1,013 | 85,805 | 10 | 18 | 92 | 129 | 289 | 475 | 1,317 | 1,900 |
| Sex offenses (except forcible rape and prostitution) | 81,887 | 7,506 | 14,418 | 67,469 | 658 | 2,081 | 4,767 | 2,442 | 2,230 | 2,240 | 2,205 | 2,183 |
| Drug abuse violations | 1,118,346 | 21,830 | 131,220 | 987,126 | 266 | 2,281 | 19,283 | 24,103 | 36,747 | 48,540 | 60,142 | 57,756 |
| Gambling | 15,845 | 242 | 1,493 | 14,352 | 2 | 24 | 216 | 299 | 423 | 529 | 531 | 537 |
| Offenses against family and children | 92,133 | 1,475 | 4,234 | 87,899 | 98 | 293 | 1,084 | 915 | 978 | 966 | 2,009 | 2,207 |
| Driving under the influence | 1,079,533 | 329 | 10,573 | 1,068,960 | 117 | 24 | 186 | 534 | 2,708 | 7,002 | 15,769 | 22,312 |
| Liquor laws | 424,452 | 10,083 | 94,030 | 330,422 | 153 | 832 | 9,098 | 14,001 | 27,520 | 42,426 | 60,029 | 59,868 |
| Drunkenness | 571,420 | 2,065 | 14,778 | 556,642 | 120 | 197 | 1,748 | 2,298 | 3,606 | 6,809 | 12,831 | 14,090 |
| Disorderly conduct | 601,002 | 48,868 | 137,328 | 463,674 | 1,741 | 10,752 | 36,375 | 27,057 | 30,178 | 31,225 | 30,639 | 27,148 |
| Vagrancy | 21,413 | 925 | 3,657 | 17,756 | 19 | 154 | 752 | 773 | 946 | 1,013 | 1,072 | 960 |
| All other offenses (except traffic) | 3,046,100 | 99,318 | 343,669 | 2,702,431 | 5,396 | 20,348 | 73,574 | 61,382 | 81,918 | 101,051 | 124,694 | 132,388 |
| Suspicion | 11,395 | 551 | 1,712 | 9,683 | 39 | 128 | 384 | 396 | 385 | 380 | 407 | 399 |
| Curfew and loitering law violations | 105,888 | 31,609 | 105,888 | X | 537 | 4,552 | 26,520 | 24,667 | 28,098 | 21,514 | X | X |
| Runaways | 201,459 | 90,031 | 201,459 | X | 2,117 | 15,242 | 72,672 | 51,634 | 41,246 | 18,548 | X | X |

Note: See Note, table 4.1. This table presents data from all law enforcement agencies submitting complete reports for 12 months in 1994 (Source, p. 381). Population figures represent U.S. Bureau of the Census July 1, 1994 estimates. For definitions of offenses, see Appendix 3.

[a]Because of rounding, percents may not add to total.
[b]Violent crimes are offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.
[c]Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson.
[d]Includes arson.

Source: U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 1994* (Washington, DC: USGPO, 1995), pp. 227, 228.

Table 5.7

**Criminal cases filed, terminated, and pending in U.S. District Courts**

1955-95

| | Pending at beginning of report-ing period | Total filed | | Total terminated | Pending at end of report-ing period |
|---|---|---|---|---|---|
| | | Original proceedings[a] | Received by transfer | | |
| 1955 | 10,100 | 35,310 | 1,813 | 38,580 | 8,643 |
| 1956 | 8,643 | 28,739 | 1,914 | 32,053 | 7,243 |
| 1957 | 7,243 | 28,120 | 1,958 | 29,626 | 7,495 |
| 1958 | 7,495 | 28,897 | 1,840 | 30,781 | 7,451 |
| 1959 | 7,451 | 28,729 | 1,924 | 30,377 | 7,727 |
| 1960 | 7,727 | 28,137 | 1,691 | 29,864 | 7,691 |
| 1961 | 7,691 | 28,460 | 1,808 | 29,881 | 8,078 |
| 1962 | 8,078 | 29,274 | 1,743 | 30,013 | 9,082 |
| 1963 | 9,082 | 29,958 | 1,888 | 31,546 | 9,282 |
| 1964 | 9,282 | 29,944 | 1,789 | 31,437 | 9,578 |
| 1965 | 9,578 | 31,569 | 1,765 | 32,078 | 10,834 |
| 1966 | 10,834 | 29,729 | 1,765 | 30,644 | 11,684 |
| 1967 | 11,684 | 30,534 | 1,673 | 30,350 | 13,541 |
| 1968 | 13,541 | 30,714 | 1,857 | 31,348 | 14,763 |
| 1969 | 14,763 | 33,585 | 1,828 | 32,406 | 17,770 |
| 1970 | 17,770 | 38,102 | 1,857 | 36,819 | 20,910 |
| 1971 | 20,910 | 41,290 | 1,867 | 39,582 | 24,485 |
| 1972 | 24,485 | 47,043 | 2,011 | 48,101 | 25,438 |
| 1973 | 25,438 | 40,387 | 2,087 | 43,456 | 24,416 |
| 1974 | 24,416 | 37,667 | 2,087 | 41,526 | 22,644 |
| 1975 | 22,644 | 41,108 | 2,174 | 43,515 | 22,411 |
| 1976 | 22,411 | 39,147 | 1,911 | 43,675 | 19,794 |
| 1977 | 19,794 | 40,000 | 1,589 | 44,233 | 17,150 |
| 1978 | 17,150 | 34,624 | 1,259 | 37,286 | 15,847 |
| 1979 | 15,847 | 31,536 | 1,152 | 33,411 | 15,124 |
| 1980 | 15,124 | 27,910 | 1,022 | 29,297 | 14,759 |
| 1981 | 14,759 | 30,353 | 975 | 30,221 | 15,866 |
| 1982 | 15,866 | 31,623 | 1,059 | 31,889 | 16,659 |
| 1983 | 16,659 | 34,681 | 1,191 | 33,985 | 18,546 |
| 1984 | 18,587 | 35,911 | 934 | 35,494 | 19,938 |
| 1985 | 19,938 | 38,546 | 954 | 37,139 | 22,299 |
| 1986 | 22,299 | 40,427 | 1,063 | 39,333 | 24,456 |
| 1987 | 24,453 | 42,156 | 1,136 | 42,287 | 25,458 |
| 1988 | 25,263 | 43,503 | 1,082 | 42,115 | 27,733 |
| 1989 | 27,722 | 44,891 | 1,104 | 42,810 | 30,907 |
| 1990 | 30,910 | 47,862 | 942 | 44,295 | 35,519 |
| 1991 | 35,021 | 45,055 | 880 | 42,786 | 37,968 |
| 1992 | 39,562 | 47,472 | 894 | 44,147 | 43,781 |
| 1993 | 34,078 | 45,903 | 883 | 44,900 | 36,084 |
| 1994 | 28,701 | 44,667 | 606 | 45,129 | 29,045 |
| 1995 | 26,326 | 45,053 | 735 | 41,527 | 30,589 |

Note: There were two reporting changes during fiscal year 1976 that have affected the data base. Beginning Oct. 1, 1975, all minor offenses (offenses involving penalties that do not exceed 1 year imprisonment or a fine of more than $1,000), with the exception of most petty offenses (offenses involving penalties that do not exceed 6 months incarceration and/or a fine of not more than $500), are included. Minor offenses are generally disposed of by the magistrates and, in past years, most of these minor offenses would not have been counted in the workload of the district courts. Second, when the Federal Government's motion to dismiss an original indictment or information is granted, the superseding indictment or information does not become a new case as in the years prior to 1976, but remains the same case. (An indictment is the charging document of the grand jury, and an information is the charging document of the U.S. attorney.) Data for 1955-91 are reported for the 12-month period ending June 30. Beginning in 1992, data are reported for the Federal fiscal year, which is the 12-month period ending September 30. These data were taken from the first year they were reported and do not reflect revisions made in subsequent years. Therefore, these data may differ from figures presented in table 5.8.

"Received by transfer" includes defendants transferred by Rule 20, ***Federal Rules of Criminal Procedure***, which provides that defendants who (1) are arrested or held in a district other than that in which an indictment or information is pending against them or in which the warrant for their arrest was issued and (2) state in writing that they wish to plead guilty or nolo contendere, may consent to disposition of the case in the district in which they are arrested or are held, subject to the approval of the U.S. attorney for both districts.

[a]Includes reopens.

Source: Administrative Office of the United States Courts, ***Annual Report of the Director, 1981***, p. 94; ***1983***, pp. 302, 303; ***1985***, pp. 336, 337; ***1986***, pp. 232, 233; ***1995***, pp. 195, 196 (Washington, DC: Administrative Office of the United States Courts); and Administrative Office of the United States Courts, ***Annual Report of the Director, 1982***, pp. 272, 273; ***1984***, pp. 310, 311; ***1987***, pp. 238, 239; ***1988***, pp. 241, 242; ***1989***, pp. 239, 240; ***1990***, pp. 176, 177; ***1991***, pp. 230, 231; ***1992***, pp. 232, 233; ***1993***, pp. AI111, AI112; ***1994***, Table D-1 (Washington, DC: USGPO). Table constructed by SOURCEBOOK staff.

Table 5.8

**Criminal cases filed in U.S. District Courts**

By offense, fiscal years 1993, 1994, and 1995

| Offense | 1993 | 1994 | 1995 |
|---|---|---|---|
| Total | 45,903 | 44,678 | 45,053 |
| Miscellaneous general offenses | 11,838 | 12,414 | 11,113 |
| Drunk driving and traffic | 6,229 | 7,079 | 5,214 |
| Weapons and firearms | 3,636 | 3,113 | 3,620 |
| Escape[1] | 725 | 739 | 687 |
| Kidnaping | 67 | 68 | 91 |
| Bribery | 205 | 283 | 190 |
| Extortion, racketeering, and threats | 491 | 509 | 713 |
| Gambling and lottery | 75 | 80 | 28 |
| Perjury | 111 | 93 | 95 |
| Other | 299 | 450 | 487 |
| Fraud | 7,575 | 7,089 | 7,416 |
| Drug laws | 12,239 | 11,362 | 11,520 |
| Narcotics | 6,318 | 5,177 | NA |
| Marijuana | 3,756 | 3,655 | NA |
| Controlled substances | 2,088 | 2,425 | NA |
| Other drug statutes | 77 | 99 | NA |
| Larceny and theft | 3,322 | 3,336 | 3,432 |
| Forgery and counterfeiting | 1,059 | 1,093 | 1,001 |
| Embezzlement | 1,857 | 1,576 | 1,368 |
| Immigration laws | 2,487 | 2,596 | 3,960 |
| Federal statutes | 2,200 | 2,090 | 2,402 |
| Agricultural/conservation acts | 254 | 251 | 401 |
| Migratory bird laws | 27 | 39 | 27 |
| Civil rights[2] | 62 | 70 | 73 |
| Motor Carrier Act | 20 | 11 | 12 |
| Antitrust violations | 71 | 43 | 38 |
| Food and Drug Act | 67 | 46 | 53 |
| Contempt | 56 | 74 | 69 |
| National defense laws | 144 | 95 | 83 |
| Customs laws | 69 | 86 | 97 |
| Postal laws | 212 | 182 | 202 |
| Other | 1,218 | 1,191 | 1,343 |
| Robbery | 1,789 | 1,520 | 1,240 |
| Bank | 1,714 | 1,468 | 1,168 |
| Postal | 51 | 35 | 43 |
| Other | 24 | 17 | 29 |
| Assault | 523 | 562 | 561 |
| Auto theft | 349 | 338 | 267 |
| Burglary | 141 | 139 | 63 |
| Homicide | 181 | 195 | 295 |
| Sex offenses | 337 | 359 | 412 |
| Liquor, internal Revenue | 8 | 2 | 3 |

Note: See Note, table 5.7. Some data for 1994 have been revised by the Source and will differ from previous editions of SOURCEBOOK.

[1]Includes escape from custody; aiding or abetting an escape; failure to appear in court; and bail jumping.

[2]Includes cases removed from State courts under provisions of the Civil Rights Act, Title 28 U.S.C. Section 1443.

Source: Administrative Office of the United States Courts, ***Annual Report of the Director, 1995*** (Washington, DC: Administrative Office of the United States Courts, 1996), pp. 207-209. Table adapted by SOURCEBOOK staff.



Table 5.1

**Requests for immunity by Federal prosecutors to the U.S. Attorney General and witnesses involved in these requests**

By origin of request, fiscal years 1973-95

| Fiscal year | Requests | | | Witnesses | | |
|---|---|---|---|---|---|---|
| | Total number | Criminal Division | | Total number | Criminal Division | |
| | | Number | Percent | | Number | Percent |
| 1973 | 1,180 | 789 | 68% | 2,710 | 1,598 | 59% |
| 1974 | 1,410 | 1,121 | 80 | 3,856 | 2,065 | 56 |
| 1975 | 1,630 | 1,259 | 77 | 3,733 | 2,183 | 59 |
| 1976 | 1,780 | 1,361 | 76 | 3,823 | 2,364 | 62 |
| 1977 | 1,798 | 1,250 | 70 | 4,413 | 1,986 | 45 |
| 1978 | 1,445 | 950 | 66 | 2,997 | 1,403 | 47 |
| 1979 | 1,596 | 1,163 | 73 | 3,204 | 1,816 | 57 |
| 1980 | 1,653 | 1,207 | 73 | 3,530 | 1,980 | 54 |
| 1981 | 1,668 | 1,252 | 74 | 3,271 | 2,032 | 62 |
| 1982 | 1,836 | 1,394 | 76 | 3,810 | 2,233 | 59 |
| 1983 | 1,986 | 1,423 | 72 | 4,238 | 2,243 | 53 |
| 1984 | 2,378 | 1,838 | 77 | 4,784 | 2,858 | 60 |
| 1985 | 2,451 | 1,899 | 77 | 5,146 | 3,339 | 65 |
| 1986 | 2,530 | 1,948 | 76 | 5,013 | 3,267 | 65 |
| 1987 | 2,369 | 1,860 | 79 | 4,603 | 3,249 | 71 |
| 1988 | 2,366 | 1,821 | 77 | 4,702 | 3,205 | 68 |
| 1989 | 2,301 | 1,807 | 79 | 4,495 | 3,245 | 72 |
| 1990 | 2,049 | 1,694 | 83 | 3,735 | 2,905 | 78 |
| 1991 | 1,963 | 1,561 | 80 | 3,377 | 2,449 | 73 |
| 1992 | 1,819 | 1,417 | 78 | 3,240 | 2,309 | 71 |
| 1993 | 1,959 | 1,466 | 75 | 3,521 | 2,383 | 68 |
| 1994 | 1,717 | 1,282 | 74 | 3,279 | 2,225 | 68 |
| 1995 | 1,519 | 1,191 | 78 | 2,775 | 1,998 | 72 |

Note: These data reflect requests received from Federal prosecutors under 18 U.S.C. 6001-6005, the statute that now governs the granting of use immunity. 18 U.S.C. 6003 requires all Federal prosecuting attorneys to receive authorization from the U.S. Attorney General (or representative) before seeking a court order for witness immunity. It should be noted that in some cases in which the authorization is obtained, the prosecutor may decide not to seek the immunity order from the courts. Therefore, the number of witnesses actually granted immunity is probably lower than the data in the table indicate. It should also be noted that data for 1973 and 1974 include a total of 11 requests and 27 witnesses, and 7 requests and witnesses, respectively, falling under an older statute, 18 U.S.C. 2514, which has since been repealed. "Criminal Division" refers to the Criminal Division of the U.S. Department of Justice and the U.S. attorneys. Other requests, not pertaining to the Criminal Division, come from the remaining divisions of the U.S. Department of Justice (e.g., Antitrust, Tax, Civil Division, Civil Rights, and Lands and Natural Resources), as well as from the other Federal agencies (e.g., Interstate Commerce Commission, Federal Trade Commission, Securities and Exchange Commission, and Department of the Army) and from Congress, all of which may request immunity for witnesses. Data for fiscal years 1987-93 have been revised by the Source and may differ from previous editions of SOURCEBOOK.

Source: Table constructed by SOURCEBOOK staff from data provided by the U.S. Department of Justice, Criminal Division.

Table 5.2

**Court-authorized orders for interception of wire, oral, or electronic communications**

United States, 1968-94

| | State | Federal |
|---|---|---|
| 1968[a] | 174 | 0 |
| 1969 | 268 | 33 |
| 1970 | 414 | 182 |
| 1971 | 531 | 285 |
| 1972 | 649 | 206 |
| 1973 | 734 | 130 |
| 1974 | 607 | 121 |
| 1975 | 502 | 108 |
| 1976 | 596 | 137 |
| 1977 | 549 | 77 |
| 1978 | 499 | 81 |
| 1979 | 488 | 87 |
| 1980 | 493 | 81 |
| 1981 | 483 | 106 |
| 1982 | 448 | 130 |
| 1983 | 440 | 208 |
| 1984 | 512 | 289 |
| 1985 | 541 | 243 |
| 1986 | 504 | 250 |
| 1987 | 437 | 236 |
| 1988 | 445 | 283 |
| 1989 | 453 | 310 |
| 1990 | 548 | 324 |
| 1991 | 592 | 356 |
| 1992 | 575 | 340 |
| 1993 | 596 | 450 |
| 1994 | 600 | 554 |

Note: The Director of the Administrative Office of the United States Courts is required, in accordance with provisions of 18 U.S.C. 2519(1), to transmit to Congress a report regarding applications for orders authorizing or approving the interception of wire, oral, or electronic communications. This report is required to contain information about the number of such orders and any extensions granted. Every State and Federal judge is required to file a written report on each application made. This report is required to contain information on the grants and denials, name of applicant, offense involved, type and location of device, and duration of authorized intercept. Prosecuting officials who have applied for intercept orders are required to file reports containing information on the cost of the intercepts, the number of days the device was in operation, the number of incriminating intercepts recorded, and the results of the intercepts in terms of the number of arrests, trials, convictions, and motions to suppress evidence obtained through the use of intercepts (Source: ***1995***, pp. 1-3). A total of 41 jurisdictions had statutes authorizing the interception of wire, oral, or electronic communications during 1994. Eighteen of these jurisdictions did have court-authorized orders for interception during 1994 (Source: ***1995***, p. 3).

[a]For 1968, the reporting period was from June to December.

Source: Administrative Office of the United States Courts, ***Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1977 to December 31, 1977*** (Washington, DC: Administrative Office of the United States Courts, 1978), p. xiv; Administrative Office of the United States Courts, ***Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications for the Period January 1, 1988 to December 31, 1988***, p. 19; ***Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications for the Period January 1, 1992 to December 31, 1992***, p. 24 (Washington, DC: USGPO); and Administrative Office of the United States Courts, ***Wiretap Report for the Period January 1, 1994 to December 31, 1994*** (Washington, DC: Administrative Office of the United States Courts, 1995), p. 21. Table adapted by SOURCEBOOK staff.

Table 5.3

**Court-authorized orders for interception of wire, oral, or electronic communications**

By major offense under investigation, 1994

(This table shows the most serious offense for each court-authorized interception.)

| Offense | Total | Federal | State |
|---|---|---|---|
| All offenses | 1,154 | 554 | 600 |
| Narcotics | 876 | 435 | 441 |
| Racketeering | 88 | 68 | 20 |
| Gambling | 85 | 8 | 78 |
| Homicide and assault | 19 | 4 | 15 |
| Larceny and theft | 18 | 1 | 17 |
| Kidnaping | 11 | 7 | 4 |
| Loansharking, usury, and extortion | 8 | 4 | 4 |
| Bribery | 6 | 1 | 5 |
| Other | 42 | 26 | 16 |

Note: See Note, table 5.2.

Source: Administrative Office of the United States Courts, ***Wiretap Report for the Period January 1, 1994 to December 31, 1994*** (Washington, DC: Administrative Office of the United States Courts, 1995), pp. 12-14.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

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No.

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VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH,
HORACE JOINER, AND JOSEPH TIDWELL
Petitioners,

v.

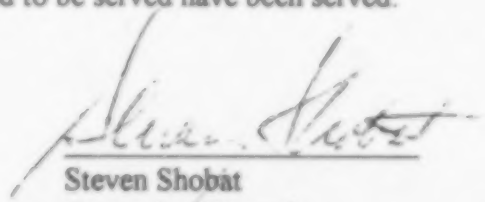
UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing "Petition for a Writ of Certiorari" and "Motion for Leave to Proced In Forma Pauperis" on the United States of America by mailing three copies of each on April 16, 1997 in an envelope properly addressed to:

Solicitor General of the United States
Room 5614
10th & Constitution Avenue, N.W.
Department of Justice
Washington, D.C. 20530

which envelope was deposited in the United States Post Office at Chicago, Illinois, proper first class postage fully prepaid and that all parties required to be served have been served.



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ORIGINAL

No. 96-8732



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

---

VINCENT EDWARDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

# BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a general jury verdict of guilty in a prosecution for a drug conspiracy under 21 U.S.C. 846 that involves more than one drug requires the district court to set a base offense level under the Sentencing Guidelines by considering only the drug that supplies the lowest sentence.

2. Whether the evidence was insufficient to support defendant Tidwell's conviction under 18 U.S.C. 924(c) for using and carrying a weapon during and in relation to a drug trafficking crime.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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No. 96-8732

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 105 F.3d 1179.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1997. The petition for a writ of certiorari was filed on April 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to possess with intent to distribute and to distribute

powder cocaine and cocaine base (i.e., "crack" cocaine), in violation of 21 U.S.C. 846. In addition, petitioners Joseph Tidwell, Vincent Edwards, and Reynolds Wintersmith were each convicted on one count of possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Joseph Tidwell was also convicted of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c).

Petitioners Karl Fort and Reynolds Wintersmith were sentenced to life imprisonment. Petitioner Joseph Tidwell was sentenced to 252 months' imprisonment on the conspiracy count, a concurrent term of 240 months' imprisonment on the possession count, and a consecutive term of 60 months' imprisonment on the Section 924(c) count. Petitioner Vincent Edwards was sentenced to 120 months' imprisonment on the conspiracy and possession counts, to run concurrently. Petitioner Horace Joiner was sentenced to 126 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A4.

1. Petitioners were members of a conspiracy that, between 1989 and July 28, 1993, distributed powder and crack cocaine, primarily in Rockford, Illinois. The conspiracy was organized and directed by a core group known as "the Mob." Members of the Mob obtained kilogram quantities of powder cocaine, which they resold in smaller quantities, as either powder or crack cocaine. The Mob employed "workers" to sell the drugs and "runners" to keep the workers supplied with drugs. Mob members held weekly meetings to



discuss business, made key decisions by majority vote, and divided profits equally. Gov't C.A. Br. 3-14; see United States v. Evans, 92 F.3d 540, 541-542 (7th Cir. 1996), cert. denied, 117 S. Ct. 404 (1996).

Although in the early years the Mob sold only powder cocaine, beginning in the spring of 1992 the group was primarily involved in sales of crack cocaine. Pet. 4. Members of the Mob created crack cocaine by "cooking" powder cocaine using standard kitchen equipment. Gov't C.A. Br. 3-4, 8-9. The government introduced abundant evidence at trial of the group's involvement in sales of crack cocaine, including testimony of co-conspirators; numerous tape-recorded conversations relating to crack cocaine; several purchases of crack from conspirators by a government informant; seizures of crack from conspirators, including one seizure of almost a kilogram of crack; and the seizure from Mob drug houses of paraphernalia (including crack-coated paper towels and razor blades) relating to the manufacture and distribution of crack. See Gov't C.A. Br. 34-35.

During 1993, petitioner Joseph Tidwell sold Mob-owned cocaine at a housing project in Rockford. On the night of April 30, 1993, the police observed him driving his car with his lights off. When the police signalled him to pull over, Tidwell attempted to elude them. While being pursued, Tidwell threw a napkin containing five small bags of crack cocaine out of the car window. Tidwell was later arrested, and police recovered the napkin with the crack cocaine. In addition, police discovered a loaded .45 caliber semi-

automatic pistol in the glove compartment of Tidwell's car. Gov't C.A. Br. 11-12.

2. A superseding indictment charged 20 defendants, including petitioners, with various drug and weapons offenses. Count 1 of the superseding indictment charged petitioners and others with violating 21 U.S.C. 846 by conspiring "knowingly and intentionally to possess with intent to distribute and to distribute mixtures containing cocaine * * * and cocaine base * * * in violation of Title 21 United States Code, Section 841(a)(1)."

Five defendants pleaded guilty, and the remaining 15 defendants were tried in three groups. Petitioners were tried together in a three-week trial. At the conclusion of the evidence, the trial court instructed the jury that "[t]he defendants * * * are charged in Count 1 of the indictment with conspiring to possess with the intent to distribute and to distribute cocaine and cocaine base." In addition, the jury was instructed that "[t]he government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. * * * However, the government must prove that the conspiracy * * * involved measurable amounts of cocaine or cocaine base." Gov't C.A. Br. 22. The court then gave the jury a general verdict form. The verdict form did not require that the jury specify which drug or drugs petitioners had conspired to distribute. Petitioners did not object to the jury instruction requiring proof of a measurable amount of either cocaine or cocaine base. Nor did they request the use of a special verdict form on Count 1. Pet. App. A2.



After the jury returned a verdict of guilty, the district court held separate sentencing hearings at which it determined, pursuant to Sentencing Guidelines §§ 2D1.1 and 1B1.3(a)(2), the quantities of powder and crack cocaine that should be attributed to each defendant. None of the petitioners contended at his sentencing hearing that the jury's general verdict precluded the district court from considering the quantities of crack cocaine that the participants conspired to possess or distribute.

3. The court of appeals affirmed. Pet. App. A1-A4. The court rejected petitioners' contention, raised for the first time on appeal, that the district court should have imposed sentence as if all of the cocaine in the conspiracy were powder cocaine because the jury's verdict did not unambiguously establish that they sold any crack cocaine. Pet. App. A1-A4.[1]

The court began by noting that "under the Sentencing Guidelines, the judge alone determines which drug was distributed and in what quantity." Pet. App. A2 (citing Witte v. United States, 515 U.S. 389, 410-405 (1995); United States v. Cooper, 39 F.3d 167, 172 (7th Cir. 1994); United States v. Levy, 955 F.2d 1098, 1106 (7th Cir. 1992); Sentencing Guidelines § 1B1.2(d) & Application Note 5). Moreover, the court reasoned that under Sentencing Guidelines § 1B1.3, which requires the judge to take into account relevant conduct outside the offense of conviction,

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[1] The court of appeals noted that, because of the absence of an objection in the district court, the plain error standard of review applied. The court held, however, that there was "no error, and hence no plain error, in this case." Pet. App. A2.

the judge must "consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment." Therefore, the court continued, "[a] judge * * * may base a sentence on kinds and quantities of drugs that were not considered by the jury." Pet. App. A2. The court added that, "[b]ecause sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal." Id. at A3. Accordingly, the court concluded that "[w]hat a jury believes about which drug the conspirators distributed * * * is not conclusive -- and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options." Ibid.

The court acknowledged that some other courts of appeals have held that, when a jury returns a general verdict on a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if the conspiracy involved only the drug carrying the lowest penalty. Pet. App. A2, citing, inter alia, United States v. Owens, 904 F.2d 411 (8th Cir. 1990); United States v. Bounds, 985 F.2d 188 (5th Cir. 1993); United States v. Pace, 981 F.2d 1123 (10th Cir. 1992). The court concluded, however, that those decisions were incorrect, because they failed to recognize the principle that the judge is responsible for determining the identity and amount of the drug distributed under the Sentencing Guidelines. Pet. App. A2-A4. Accordingly, the court declined to



follow those decisions. Because the court's opinion clarified the existence of a circuit conflict, the panel circulated the opinion to the full court; a majority did not favor a hearing en banc. Id. at A4.

DISCUSSION

1. Petitioner contends (Pet. 8-16) that when a defendant is found guilty by general jury verdict of a conspiracy under 21 U.S.C. 846 charging an agreement involving more than one drug, the sentencing court is required to sentence the defendant based on the drug that yields the lowest sentence or to order a new trial. The court of appeals correctly rejected that claim, holding that, under the Sentencing Guidelines, the type of drug (or drugs) for which the defendant is held accountable is a sentencing factor for the judge, not the jury, to determine. Because the courts of appeals are in conflict on that issue, however, and because the issue is a recurring one in federal drug conspiracy cases, this Court's review is warranted.

a. Section 846, Title 21 United States Code, states:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

A Section 846 conspiracy to violate 21 U.S.C. 841(a) requires proof of an agreement "to manufacture, distribute, or dispense, or to possess with intent to manufacture, distribute or dispense, a controlled substance." 21 U.S.C. 841(a)(1) (emphasis added). There is no requirement that the jury find that any particular controlled substance is involved in the conspiracy in order to

establish the offense.

Because the penalty for a drug conspiracy under Section 846 is the "same" as that prescribed for the object offense of the conspiracy, when the object offense is a violation of Section 841(a)(1), the relevant penalty provisions are found in two sources. First, Section 841(b) generally makes the maximum and minimum sentence depend on the type and quantity of drugs involved in the offense. See 21 U.S.C. 841(b). Second, the Sentencing Guidelines base sentencing ranges not only on the conduct involved in the offense of conviction but also on other relevant conduct. See Sentencing Guidelines § 1B1.3, background ("Conduct that is not formally charged or is not an element of conviction may enter into the determination of the applicable guideline sentencing range. * * * [I]n a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.") (emphasis added); United States v. Watts, 117 S. Ct. 633 (1997) (per curiam). In a prosecution for drug distribution, or possession with intent to distribute, under Section 841(a)(1), the type and quantity of drugs involved are sentencing factors for the court to determine under Section 841(b) and the Guidelines.[2]

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[2] See, e.g., United States v. Lewis, 113 F. 3d 487, 492 (3d Cir. 1997) (type of drug); United States v. Cooper, 39 F.3d 167, 172 (7th Cir. 1990) (same); United States v. Lam Kwong-Wah, 966 F.2d 682, 685 (D.C. Cir.) (quantity), cert. denied, 506 U.S. 901 (1992); United States v. Morgan, 835 F.2d 79, 81 (5th Cir. 1987) (same).



The same principle applies in sentencing for conspiracy to violate Section 841(a)(1).

Petitioners' jury was properly instructed on the elements of the conspiracy offense under Section 846. The instructions informed the jury that cocaine and cocaine base are controlled substances and that the government must prove that the conspiracy involved a measurable amount of either drug. Pet. App. A2. The jury's general guilty verdict therefore includes a finding that the defendants conspired to distribute at least one "controlled substance," and it thereby comprehends all of the elements necessary to establish a violation of Section 846. At sentencing, the court had the task of determining what controlled substance was involved in the offense, 21 U.S.C. 841(b), and what conduct was attributable to the defendants under the Sentencing Guidelines' relevant conduct rules, Guidelines § 1B1.3.

In this case, petitioners do not contend that the sentencing court's consideration of crack resulted in sentences that exceeded the applicable maximum term of imprisonment under 21 U.S.C. 841(b), or that were based on an erroneous mandatory minimum term of imprisonment under that provision. Petitioners' base offense levels under the Sentencing Guidelines, however, were increased by the district court's attribution to them of quantities of crack cocaine rather than solely powder. Petitioners suggest (Pet. 9-10) that the jury trial guarantee of the Sixth Amendment requires that the jury, not the judge, determine the type of drugs involved in a multiple-drug conspiracy in violation of 21 U.S.C. 846.

The Sixth Amendment, however, requires only that the jury determine each element of the offense charged beyond a reasonable doubt. United States v. Gaudin, 115 S. Ct. 2310, 2313 (1995). The Sixth Amendment does not require that the jury determine sentencing factors. Libretti v. United States, 116 S. Ct. 356, 367-368 (1995). "[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986). Because the type of drug involved in a drug conspiracy offense is a sentencing factor, not an element of the offense, there is no requirement that the jury must find it. And there is likewise no requirement that the sentencing judge must base petitioners' sentences under the Guidelines on the drug "carrying the lesser punishment." Pet. 8.

b. The decision below conflicts with the decisions of other courts of appeals. In both United States v. Owens, 904 F.2d 411 (8th Cir. 1990), and United States v. Pace, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993), the defendants were charged with conspiring to traffic in "methamphetamine/amphetamine" under 21 U.S.C. 846. The juries in each case returned a general verdict that did not specify which drug was involved in the conspiracy. The district courts found that the conspiracy involved methamphetamine, and consequently sentenced the defendants under the Sentencing Guidelines to longer terms of imprisonment than would have been prescribed if the drug had been found to be amphetamine. The courts of appeals vacated the sentences, concluding that the defendants should have been sentenced based on



the drug yielding the less severe penalty. Owens, 904 F.2d at 415; Pace, 981 F.2d at 1130. Both courts of appeals rested their holdings on the fact that the jury verdicts did not indicate which drug formed the basis of the convictions.[3] See also United States v. Bush, 70 F.3d 557, 559-563 (10th Cir. 1995) (applying Pace in the context of sentencing following a guilty plea to drug conspiracy), cert. denied, 116 S. Ct. 795 (1996).

The Fifth Circuit has followed the same approach. In United States v. Bounds, 985 F.2d 188 (5th Cir.), cert. denied, 510 U.S. 845 (1993), the jury had found the defendant guilty of a charge of conspiring to manufacture amphetamine or phenylacetone, without specifying which drug. The district court imposed sentence "based on the theoretical amount of amphetamine producible with the amount of chemicals recovered." Id. at 194. The court of appeals reversed, stating that "[b]ecause we cannot tell which drug the jury focused upon in convicting Bounds, we [must] remand for resentencing," based on the drug yielding the lower base offense level. Id. at 195.[4]

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[3] In Pace, as here, the defendants did not object to the use of a general verdict or contend at sentencing that the district court could not use the drug leading to the higher base offense level. Nonetheless, the court of appeals concluded that the district court committed "plain error." 981 F.2d at 1128. Thus, even if the court of appeals in this case had relied on the plain error rule in rejecting petitioners' claims, which it did not (see note 1, supra), the result here would still conflict with Pace.

[4] Petitioners also rely (Pet. 8-10) on United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994), and United States v. Orozco-Prada, 732 F.2d 1076, 1083 (2d Cir.), cert. denied, 469 U.S. 845 (1984). In Garcia, the jury returned a general guilty verdict on one count of conspiracy under 21 U.S.C. 846 to violate both 21 U.S.C. 841(a)(1) and 21 U.S.C. 843(b). The court of appeals held

c. The circuit conflict on the conspiracy sentencing issue in this case warrants this Court's review. Many federal drug prosecutions involve conspiracies to distribute more than one narcotic substance, and it will often be impossible to discern from a general verdict of guilty which narcotic formed the basis of the jury's verdict.[5] Because the type of drug involved can have a

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that the object offense is a "necessary element" of the crime. 37 F.3d at 1370. Because there was no special verdict, the court held that the government was required to consent to sentencing on the basis of the object offense carrying the lower maximum term or to retry the defendant. Id. at 1371. Garcia is inapposite here. The question in Garcia -- whether the object offense in a multiple-object Section 846 conspiracy is a sentencing factor or a "necessary element" of the offense -- is distinct from the question in this case, which is whether, under the Sentencing Guidelines, the judge (rather than the jury) determines the type of drugs to be considered in sentencing defendants found guilty of a Section 846 conspiracy to violate Section 841(a).

In Orozco-Prada, the court of appeals held, in a pre-Guidelines case, that when there is a general jury verdict in a drug conspiracy charge involving both marijuana and cocaine, a sentencing court cannot impose sentence based on a finding that the conspiracy involved cocaine, when such a sentence exceeds the statutory maximum applicable to a conspiracy involving only marijuana. 732 F.2d at 1083-1084 (relying on the "problem in ascertaining juror intent" on whether the conspiracy was marijuana-related or cocaine-related). Although we disagree with Orozco-Prada, it does not assist petitioners because they do not contend that their sentences exceeded the applicable maximum term under Section 841(b).

[5] In some cases, it may be possible to draw such an inference. In this case, for example, the government argued that the court of appeals could infer that the jury found a conspiracy involving crack cocaine because several of the co-conspirators were found guilty of substantive crack cocaine offenses in violation of Section 841(a) and because the evidence at trial overwhelmingly established that the conspiracy involved crack cocaine. See Gov't C.A. Br. 33-35 (citing United States v. Peters, 617 F.2d 503, 506 (7th Cir. 1990); United States v. Dennis, 786 F.2d 1029, 1040 (11th Cir. 1986), cert. denied, 481 U.S. 1037 (1987)). The court of appeals did not reach that contention. Even if that analysis were available to interpret the jury's verdict in some cases, however, it will not always be available.



significant impact on a conspiracy defendant's ultimate sentence, the disparate approaches in the circuits could produce sizeable variations in imprisonment terms.

The disparate approaches do not flow from divergent interpretations of the Sentencing Guidelines. Although Owens, Pace, and Bounds involve Guidelines sentencing issues, those cases have applied general principles requiring a jury to find the object in a conspiracy case in order for the judge to sentence based on that object. The source of those principles is unclear. But because such a rule rests on principles that are not found in the Guidelines (or within the Commission's authority to modify), it is unlikely that action by the Sentencing Commission could alleviate the conflict.[6]

The government has on some occasions circumvented the single-conspiracy sentencing rule applied in the Fifth, Eighth, and Tenth Circuits by dividing conspiracy charges into several counts based on type of drug involved. When a single conspiracy in fact embraces several different drugs, however, that approach unnecessarily complicates the charges in an indictment. Several courts have suggested that the government may avoid the requirement

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[6] The Sentencing Commission's effort to channel the judge's findings at sentencing in multiple-object conspiracy cases when the jury verdict does not make clear which object offense the defendant conspired to commit (see Guidelines § 1B1.2(d), Application Note 5) has generated some controversy. See United States v. Malpeso, 115 F.3d 155, 167-168 (2d Cir. 1997) (noting differing views over the constitutionality of the Commission's approach; concluding that where the maximum sentence is not affected, "[t]he sentencing court's determinations on the objects of a multi-object conspiracy do not constitute criminal verdicts, such that a defendant's Sixth Amendment rights are violated").

of sentencing for a single conspiracy based on the drug carrying the lowest penalty by the use of special verdicts. See Bounds, 985 F.2d at 195; Owens, 904 F.2d at 415. While the government has sometimes employed that approach, "as a general rule special verdicts are disfavored in criminal cases," United States v. Buishas, 791 F.2d 1310, 1317 (7th Cir. 1986); see United States v. Wilson, 629 F.2d 439, 442-444 (6th Cir. 1980). More importantly, determining the type of drug or drugs to be included in relevant conduct under the Sentencing Guidelines is a task for the judge, not the jury. There is no warrant for employing special verdicts in this context to transfer that task to the jury.

2. Petitioner Joseph Tidwell also contends that the evidence was insufficient under 18 U.S.C. 924(c) to show that he was "carrying" the weapon found in the glove compartment of his car because the glove compartment may have been locked. Pet. 16-17. At trial, Tidwell acknowledged that he was "carrying guns or a gun" during the conspiracy, but contended that it was for protection because of his brother's involvement in drug trafficking. Gov't C.A. Br. 51. In his reply brief on appeal, however, Tidwell contended that the gun in his glove compartment was not carried because it may not have been "'within reasonable reach'" and "'available for immediate use.'" Tidwell Reply Br. at 2-3, quoting United States v. Baker, 78 F.3d 1241 (7th Cir. 1996), cert. denied, 117 S. Ct. 1720 (1997).

That argument warrants no further review. Numerous courts of appeals have correctly held that evidence that a defendant



transported a gun in the glove compartment of a car is sufficient to sustain a conviction for "carr[ying]" under Section 924(c)(1), United States v. Barry, 98 F.3d 373, 377 (8th Cir. 1996), 117 S. Ct. 1014 (1997); United States v. Staples, 85 F.3d 461, 464 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996); United States v. Farris, 77 F.3d 391, 395-396 (11th Cir.), cert. denied, 117 S. Ct. 241 (1996), even where the glove compartment is locked, United States v. Muscarello, 106 F.3d 636, 639 (5th Cir. 1997), petition for cert. pending, No. 96-1654. There is disagreement among the courts of appeals on whether proof of carrying under Section 924(c) requires a showing of "immediate accessibility" when a defendant transports a gun in a vehicle. See U.S. Br. in Opp. in Muscarello v. United States, No. 96-1654, at 1-13. But for the reasons given in our brief in Muscarello, the conflict does not warrant this Court's review at present.[7]

Nor is there any merit to Tidwell's reliance on Bailey v. United States, 116 S. Ct. 501 (1995). Pet. 16-17. Bailey did not construe the "carry" element of Section 924(c); it construed the "use" element. The jury instructions in this case on "use" are not inconsistent with Bailey. The instructions informed the jury, without more, that it could find Tidwell guilty if it found that he

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[7] We have provided petitioners in this case with a copy of our brief in opposition in Muscarello. As we noted in that brief and in a supplemental letter (also being served on petitioners here), only three courts of appeals have espoused the "immediate accessibility" test, two of which have granted the government's suggestions for rehearing en banc on that issue. Thus, the conflict may be resolved without the need for this Court's intervention.

"knowingly used or carried a firearm during and in relation to" the drug offense. Gov't C.A. Br. 50. Although Tidwell now suggests (Pet. 17) that he must be granted a new trial because the jury could have returned a proper verdict on "carrying" only if it were instructed to consider whether the gun was "within the defendant's reach and available for immediate use," Tidwell never requested such an instruction below; rather, Tidwell (through counsel) admitted to "carrying" a gun. There is thus no plain error warranting a new trial. See Johnson v. United States, 117 S. Ct. 1544 (1997).

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be granted. In all other respects, the petition should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

JULY 1997

96-8732

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No.



VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH, HORACE JOINER, AND JOSEPH TIDWELL
Petitioners,

v.



UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioners, Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell, by and through their respective attorneys, move pursuant to Supreme Court Rule 39.1, for leave to proceed in forma pauperis before this Court. In support of the motion, the Petitioners further state that the Petitioners have, under the Criminal Justice Act of 1964 (18 U.S.C. § 3006A), been represented by appointed counsel throughout the proceedings below and remain without sufficient funds to afford counsel or payment of costs. Attached hereto are affidavits of each of petitioners' counsel verifying their appointments under the Criminal Justice Act.

WHEREFORE petitioners respectfully pray that an order be entered granting petitioners leave to proceed in forma pauperis.

Steven Shobat
Counsel of Record

Steven Shobat
321 South Plymouth Court, Suite 1275
Chicago, Illinois 60604
(312) 922-8480



(9)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee | ) | Appeal form the United States District Court for the Northern District of Illinois-Western Division |
| v. | ) | 94-3952 |
| | ) | No. 93-CR-20024 |
| HORACE JOINER<br>Defendant-Appellant | ) | Hon. Philip G. Reinhard, Judge |

STATE OF ILLINOIS )
) ss AFFIDAVIT
COUNTY OF WINNEBAGO )

DONALD P. SULLIVAN, being first duly sworn upon oath, swears, avers and avows:

1. My name is DONALD P. SULLIVAN.

2. I am licensed to practice law in the State of Illinois in the District Court of the Northern District of Illinois, Western Division, and before the Seventh Circuit Appellate Court.

3. I was appointed to represent the defendant, HORACE JOINER, at the trial at the District Court and on appeal before the Seventh Circuit Court of Appeals, pursuant to and under the provisions of the Criminal Justice Act.

Further Affiant Sayeth Not.

DONALD P. SULLIVAN

SUBSCRIBED and SWORN to before me this 4th day of February 1997

"OFFICIAL SEAL"
TERESA D. POWERS
Notary Public, State of Illinois
My Commission Expires 07/21/00

Notary Public

## DECLARATION OF MARK D. DE BOFSKY

Mark D. DeBofsky, declares as follows:

On January 6, 1995, I was appointed by the United State Court of Appeals for the Seventh Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(d)(2), as counsel on appeal for Reynolds A. Wintersmith, appellant in case No. 94-3833.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/4/97

Mark D. DeBofsky

No. 96-8732

In The

# Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## JOINT APPENDIX

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**Petition For Certiorari Filed April 21, 1997**
**Certiorari Granted October 20, 1997**

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## Relevant Docket Entries*

VINCENT EDWARDS, et al., v. UNITED STATES
NO. 96-8732

| Date | Proceedings |
|---|---|
| | United States District Court, N.D. Illinois<br>Case No. 93-CR-20024 |
| 7/27/93 | Indictment filed. |
| 11/23/93 | Superseding Indictment filed. |
| 4/12/94 | Memorandum Opinion and Order granting defendants; motions to sever, in part, and denying them in part. Defendants Karl Fort, Joseph Tidwell, Reynolds A. Wintersmith, Vincent Edwards and Horace Joiner to be tried together. |
| 6/27/94 | Jury trial begins. |
| 7/15/94 | Jury instructed and begins deliberating. |
| 7/18/94 | Jury returns verdicts of guilty on Counts 1 (all defendants), 4 (Reynolds Wintersmith and Vincent Edwards), 5 and 6 (Joseph Tidwell). |
| 11/21/94 | Joint portion of sentencing hearing held. |
| | Judgment in a Criminal Case against Karl V. Fort (Count 1). $50 special assessment. Life imprisonment to be followed by five years' supervised release, should the laws change and the defendant is ever released. $2,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment. |

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* Entries edited for clarity and completeness.

11/22/94 Judgment in a Criminal Case against Horace Joiner (Count 1). $50 special assessment. 126 months' imprisonment to be followed by five years' supervised release. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

Judgment in a Criminal Case against Vincent Edwards (Counts 1 and 4). $100 special assessment. 120 months' imprisonment on both counts to run concurrently, to be followed by five years' supervised release. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

11/23/94 Judgment in a Criminal Case against Reynolds A. Wintersmith (Counts 1 and 4). $100 special assessment. Life imprisonment on Count 1 to run concurrently with 40 years' imprisonment on Count 4, and to be followed by five years' supervised release, should the laws change and the defendant is ever released. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

11/29/94 Notice of Appeal by Vincent Edwards. [7th Cir. No. 94-3805.]

12/1/94 Notice of Appeal by Reynolds A. Wintersmith. [7th Cir. No. 94-3833.]

12/15/94 Notice of Appeal by Horace Joiner. [7th Cir. No. 94-3952.]

12/16/94 Notice of Appeal by Karl V. Fort. [7th Cir. No. 94-3953.]



1/18/95 Judgment in a Criminal Case against Joseph Tidwell (Counts 1, 5 and 6). $150 special assessment. 252 months' imprisonment on Count 1 to run concurrently with 240 months' imprisonment on Count 5, and consecutively to 5 years' imprisonment on Count 6, and to be followed by five years' supervised release. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

2/7/95 Notice of Appeal by Joseph Tidwell. [7th Cir. No. 95-1358.]

United States Court of Appeals
for the Seventh Circuit
Case Nos. 94-3805, 94-3833, 94-3952,
94-3953 & 95-1358

2/21/95 Order consolidating cases for purposes of briefing and disposition.

12/2/96 Oral argument.

1/30/97 Opinion entered affirming the judgments of the district court.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. 93 CR 20024 |
| KARL VINCENT FORT, | ) | Violations: Title 18, |
| also known as "Short Dog," | ) | United States Code, |
| also known as "Short," | ) | Sections 922(g) and |
| HELEN LOUISE FORT, | ) | 924(c), and Title 21, |
| also known as "Helen Moton," | ) | United States Code, |
| SAMUEL TIDWELL, | ) | Sections 841(a)(1) |
| also known as "Big Dude," | ) | and 846 |
| also known as "Big Ride," | ) | SUPERSEDING |
| GREG FORT, | ) | INDICTMENT |
| also known as "G Money," | ) | |
| also known as "G," | ) | (Filed |
| MONTIE L. RUSSELL, | ) | Nov. 23, 1993) |
| also known as "Big Montie," | ) | |
| MICHAEL GILLESPIE, | ) | |
| also known as "Big Mike," | ) | |
| also known as "Big Daddy," | ) | |
| DONALD RAY BOX, | ) | |
| also known as "Big Don," | ) | |
| JOSEPH TIDWELL, | ) | |
| also known as "Reno," | ) | |
| MARCUS O. EVANS, | ) | |
| also known as "High Yellow," | ) | |
| also known as "Yellow," | ) | |
| RANDY HORTON, | ) | |
| also known as "Ready Red," | ) | |
| FITZGERALD MOORE, | ) | |
| also known as "Fitz," | ) | |
| also known as "Fritz," | ) | |



| | |
|---|---|
| HORACE JOINER, | ) |
| also known as "Jackpot," | ) |
| BRENDA THOMPSON, | ) |
| WILLIE LOCKETT, | ) |
| also known as "Clock Man," | ) |
| DEXTER HAMMOND, | ) |
| also known as "Dex," | ) |
| DECARLES McGHEE, | ) |
| also known as "Litey," | ) |
| REGINALD D. PURVIS, | ) |
| also known as "Reggie," | ) |
| REYNOLDS A. WINTERSMITH, | ) |
| also known as "Bezel," | ) |
| VINCENT EDWARDS, | ) |
| also known as "Shanks," and | ) |
| GLORIA DEAN HOLMES | ) |

## COUNT ONE

The FEBRUARY 1993 GRAND JURY charges:

1. From at least 1989, and continuing to at least July 28, 1993, at Rockford, in the Northern District of Illinois, Western Division, and elsewhere,

KARL VINCENT FORT,
also known as "Short Dog,"
also known as "Short,"
HELEN LOUISE FORT,
also known as "Helen Moton,"
SAMUEL TIDWELL,
also known as "Big Dude,"
also known as "Big Ride,"
GREG FORT,
also known as "G Money,"
also known as "G,"
MONTIE L. RUSSELL,
also known as "Big Montie,"

MICHAEL GILLESPIE,
also known as "Big Mike,"
also known as "Big Daddy,"
DONALD RAY BOX,
also known as "Big Don,"
JOSEPH TIDWELL,
also known as "Reno,"
MARCUS O. EVANS,
also known as "High Yellow,"
also known as "Yellow,"
RANDY HORTON,
also known as "Ready Red,"
FITZGERALD MOORE,
also known as "Fitz,"
also known as "Fritz,"
HORACE JOINER,
also known as "Jackpot,"
BRENDA THOMPSON,
WILLIE LOCKETT,
also known as "Clock Man,"
DEXTER HAMMOND,
also known as "Dex,"
DECARLES McGHEE,
also known as "Litey,"
REGINALD D. PURVIS,
also known as "Reggie,"
REYNOLDS A. WINTERSMITH,
also known as "Bezel,"
VINCENT EDWARDS,
also known as "Shanks,"

defendants herein, did conspire with each other and with others known and unknown to the Grand Jury knowingly and intentionally to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a



Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was the object of the conspiracy for the defendants, as members or affiliates of the Gangster Disciples street gang, to profit from the illegal sales of large quantities of powder and crack cocaine by purchasing powder cocaine in kilogram and lesser quantities, cooking the powder cocaine into crack cocaine, and selling both powder and crack cocaine at numerous distribution sites controlled by them in Rockford, Illinois and elsewhere.

3. It was a part of the conspiracy that the defendants obtained and attempted to obtain large quantities of cocaine in powder form from a variety of suppliers.

4. It was further a part of the conspiracy that the defendants "cooked" the powder cocaine, using coffee pots and other devices, at various locations in Rockford, Illinois, to convert the powder cocaine into cocaine base, otherwise known as "crack" or "rock" cocaine.

5. It was further a part of the conspiracy that the defendants packaged powder and crack cocaine into miniature ziplock bags and corners of clear plastic sandwich-size baggies, sometimes referred to as "dime bags," for street-level sales. The defendants then grouped 50 of these dime bags into "packs," "packets" or "PKs" for distribution to runners and dealers.

6. It was further a part of the conspiracy that the defendants acted and recruited others to act as "runners" to deliver the packs of powder and crack cocaine to "workers" at numerous houses and sites in Rockford, Illinois and elsewhere (hereinafter "distribution sites").

7. It was further a part of the conspiracy that the defendants sold and recruited other workers to sell street-level quantities of powder and crack cocaine at numerous distribution sites.

8. It was further a part of the conspiracy that the defendants acted and recruited others to act as "look-outs" near and in the distribution sites in order to provide warnings when the police or other individuals were in the area.

9. It was further a part of the conspiracy that the defendants established and used daily "shifts" of runners and workers at distribution sites in order to maintain the continuous sale of powder and crack cocaine over a twenty-four hour period.

10. It was further a part of the conspiracy that the defendants possessed and used digital display pagers, telephones and cellular telephones to notify each other when a powder or crack cocaine distribution site needed to be resupplied or to have money picked up, or when the defendants needed to otherwise communicate with each other regarding obtaining, possessing, cooking, packaging and distributing powder cocaine and crack cocaine.

11. It was further a part of the conspiracy that the defendants oftentimes communicated in code by entering certain predesignated numbers into a digital display pager which identified the location of a distribution site and other predesignated numbers to signal that more powder cocaine or crack cocaine was needed or that money should be picked up.



12. It was further a part of the conspiracy that at times the defendants distributed powder and crack cocaine in quantities larger than street level-quantities or dime bags.

13. It was further a part of the conspiracy that the defendants used coded language when talking to each other on the telephone in order to avoid detection and apprehension by law enforcement authorities.

14. It was further a part of the conspiracy that the defendants used their membership in or affiliation with the Gangster Disciples street gang to maintain order within the conspiracy and that the defendants used beatings and fines to punish members or affiliates of the Gangster Disciples street gang and other individuals.

15. It was further a part of the conspiracy that the members of the conspiracy used force and violence and their membership in or affiliation with the Gangster Disciples street gang to intimidate and to drive out competing distributors of powder and crack cocaine from the Gangster Disciples street gang's "turf" or "territory".

16. It was further a part of the conspiracy that the defendants used and caused others to use force and violence and threats of force and violence to collect payment for sales of powder cocaine and crack cocaine.

17. It was further a part of the conspiracy that the defendants used and possessed firearms in order to protect and further the goals and objectives of the conspiracy.

18. It was further a part of the conspiracy that when members of the conspiracy were arrested on various

charges, the defendants would notify each other of the arrest, provide money to be used to bond out arrested members, place money in the jail expense account of arrested members, obtain and pay for attorneys for arrested members, and provide each other with law enforcement agencies reports, records, affidavits and warrants obtained by the arrested members.

19. It was further a part of the conspiracy that when members of the conspiracy were arrested on various charges, defendants would exert and attempt to exert control over the arrested members in an attempt to discourage cooperation with law enforcement authorities.

20. It was further a part of the conspiracy that when members of the conspiracy were being sought by law enforcement authorities, defendants would assist in hiding the sought after members of the conspiracy from law enforcement authorities.

21. It was further a part of the conspiracy that the defendants misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden the purposes of and the acts done in furtherance of the conspiracy described herein, and used surveillance and counter surveillance techniques, and other means to avoid detection and apprehension by law enforcement authorities and otherwise to provide security for members of the conspiracy.

All in violation of Title 21, United States Code, Section 846.



## COUNT TWO

The FEBRUARY 1993 GRAND JURY further charges:

On or about January 15, 1993, at Rockford, in the Northern District of Illinois, Western Division,

KARL VINCENT FORT,
also known as "Short Dog,"
also known as "Short,"

defendant herein, knowingly and intentionally did distribute and cause to be distributed approximately .30 grams of a mixture containing cocaine base, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

* * *

## COUNT FOUR

The FEBRUARY 1993 GRAND JURY further charges:

On or about April 22, 1993, at Rockford, in the Northern District of Illinois, Western Division,

VINCENT EDWARDS,
also known as "Shanks," and
REYNOLDS WINTERSMITH,
also known as "Bezel,"

defendants herein, knowingly and intentionally did possess with the intent to distribute approximately 5.32 grams of mixtures containing cocaine base, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

## COUNT FIVE

The FEBRUARY 1993 GRAND JURY further charges:

On or about April 30, 1993, at Rockford, in the Northern District of Illinois, Western Division,

JOSEPH TIDWELL,
also known as "Reno,"

defendant herein, knowingly and intentionally did possess with the intent to distribute approximately .7 grams of mixtures containing cocaine base, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

## COUNT SIX

The FEBRUARY 1993 GRAND JURY further charges:

On or about April 30, 1993, at Rockford, in the Northern District of Illinois, Western Division,

JOSEPH TIDWELL,
also known as "Reno,"

defendant herein, during and in relation to a drug trafficking crime, namely the offenses described in Counts One and Five of this indictment, knowingly used and carried a firearm, namely:

a .45 caliber Haskell, model JS-45, semi-automatic pistol, serial number 022923;

In violation of Title 18, United States Code, Section 924(c).

* * *



In the United States District Court
for the Northern District of Illinois,
Western Division

(Caption Omitted In Printing)

* * *

Jury Instructions

Defendants Karl Vincent Fort, Joseph Tidwell, Horace Joiner, Reynolds Wintersmith, and Vincent Edwards are charged in Count One of the indictment with conspiring to possess with the intent to distribute and to distribute cocaine and cocaine base.

Defendants Reynolds Wintersmith and Vincent Edwards are charged in Count Four of the indictment with possessing approximately 5.32 grams of mixtures containing cocaine base with the intent to distribute on April 22, 1993.

Defendant Joseph Tidwell is charged in Count Five of the indictment with possessing approximately .7 grams of mixtures containing cocaine base with the intent to distribute on April 30, 1993.

Defendant Joseph Tidwell is charged in Count Six of the indictment with using and carrying a firearm during and in relation to the conspiracy charged in Count One of the indictment and the possession of cocaine base with intent to distribute charged on Count Five of the indictment.

Each defendant has denied that he is guilty of the charges contained in the indictment.

* * *

In order to establish the offense of conspiracy as charged in Count One of the indictment, as to each defendant the government must prove these elements beyond a reasonable doubt:

First, that the alleged conspiracy existed; and

Second, that the defendant knowingly and intentionally became a member of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the acts and statements of all the alleged participants.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be



accomplished. The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant in the charged conspiracy.

Only each defendant's own words and acts show whether that particular defendant joined the conspiracy. You may consider statements by other persons to decide what a particular defendant did or said, or to help you understand that particular defendant's acts and statements.

If you decide that a defendant joined the conspiracy, you may consider the statements by other persons in order to decide questions that are pertinent to the other accusations against the defendant.

A defendant charged with conspiracy can be convicted, in the alternative, as an aider and abettor of that conspiracy.

A person can be guilty of aiding and abetting a conspiracy when the person commits an act in furtherance of the conspiracy, provided the person had knowledge of the conspiracy's existence at the time of his acts, and intended by his actions to aid the conspiracy. One can aid and abet a conspiracy without necessarily participating in the original agreement. One who aids and abets a conspiracy is culpable as a principal.

If you find that a defendant was a member of the conspiracy charged in Count One of the indictment at anytime within the period alleged, it is not a defense to that charge that the defendant later attempted to withdraw from the conspiracy.

You are hereby instructed as a matter of law that conspiracy to possess with the intent to distribute cocaine and cocaine base and possession of cocaine base with the intent to distribute are drug trafficking crimes as that term is used in these instructions.

You are instructed as a matter of law that cocaine and cocaine base are Schedule II Narcotic Drug Controlled Substances.

The indictment charges in Count One that the defendants conspired to possess with the intent to distribute and to distribute cocaine and cocaine base and in Counts Four and Five that a certain amount of cocaine base was possessed with the intent to distribute.

The government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. Neither does the government have to prove that the exact amount of cocaine base charged in the indictment was possessed with the intent to distribute. However, the government must prove that the conspiracy and the possession charges involved measurable amounts of cocaine or cocaine base.

* * *

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## APPENDIX VERDICT FORMS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| | ) | No. 93 CR 20024 |
| v. | ) | Judge Philip G. Reinhard |
| VINCENT EDWARDS | ) | |

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, VINCENT EDWARDS, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles R. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 Jul 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard



**VERDICT**

(Filed July 18, 1994)

We, the jury find the defendant, VINCENT EDWARDS, GUILTY of the drug possession with intent to distribute charge contained in Count Four of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 Jul 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| | ) | No. 93 CR 20024 |
| v. | ) | Judge Philip G. Reinhard |
| KARL VINCENT FORT | ) | |

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, KARL VINCENT FORT, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON
/s/ Illegible
/s/ James H. Button
/s/ Joyce I. Temple
/s/ Illegible
/s/ Gerald S. Hollis
/s/ Marlene Graham
/s/ J.E. Illegible
/s/ Christopher A. Jones
/s/ Illegible
/s/ April Illegible
/s/ Charles K. Humphrey

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA )
)
v. ) No. 93 CR 20024
) Judge Philip G. Reinhard
REYNOLDS WINTERSMITH )

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, REYNOLDS WINTERSMITH, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON
/s/ Illegible
/s/ James H. Button
/s/ Joyce I. Temple
/s/ Illegible
/s/ Gerald S. Hollis
/s/ Marlene Graham
/s/ J.E. Illegible
/s/ Christopher A. Jones
/s/ Charles K. Humphrey
/s/ Illegible
/s/ April Illegible

DATE: 18 July 1994



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

**VERDICT**

(Filed July 18, 1994)

We, the jury find the defendant, REYNOLDS WINTERSMITH, GUILTY of the drug possession with intent to distribute charge contained in Count Four of the indictment.

/s/ Thomas J. Todd
FOREPERSON
/s/ Illegible
/s/ James H. Butlor
/s/ Joyce I. Temple
/s/ Illegible
/s/ Gerald S. Hollis
/s/ Marlene Graham
/s/ J.E. Illegible
/s/ Christopher A. Jones
/s/ Charles K. Humphrey
/s/ Illegible
/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | No. 93 CR 20024 |
| | ) | Judge Philip G. Reinhard |
| v. | ) | |
| | ) | |
| HORACE JOINER | ) | |

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, HORACE JOINER, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | No. 93 CR 20024 |
| | ) | Judge Philip G. Reinhard |
| v. | ) | |
| | ) | |
| JOSEPH TIDWELL | ) | |

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, JOSEPH TIDWELL, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, JOSEPH TIDWELL, GUILTY of the drug possession with intent to distribute charge contained in Count Five of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

**VERDICT**

(Filed Jul 18, 1994)

We, the jury find the defendant, JOSEPH TIDWELL, GUILTY of using or carrying a firearm during and in relation to the drug conspiracy charge contained in Count One or the drug possession with intent to distribute charge contained in Count Five, as charged in Count Six of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles R. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994

**UNITED STATES DISTRICT COURT**
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

VINCENT EDWARDS

(Name of Defendant)

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

Case Number:
93 CR 20024-19

(Filed Dec 9 1994)

John Reddington
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One and Four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC § 846 | Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base | 07/28/93 | One |
| 21 USC § 841(a)(1) | Possess With Intent to Distribute Cocaine Base | 04/22/93 | Four |



The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) One and Four, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 353-60-6705

Defendant's Date of Birth: 07/17/71

Defendant's Mailing Address:
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, IL 60605

Defendant's Residence Address:
Same

Tuesday, November 22, 1994
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer

Philip G. Reinhard, Judge
Name & Title of Judicial Officer

November 23, 1994
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Twenty (120) Months on Counts One and Four to run concurrently.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be incarcerated in an institution in Memphis, Tennessee that does not have any cooperating defendants in this case and that meets the security concerns of the Bureau of Prisons. The defendant should be enrolled in a comprehensive drug abuse treatment program.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.



## RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant is to receive drug aftercare treatment at the discretion of the probation officer.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;



7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.



## DENIAL OF FEDERAL BENEFITS
## (For Offenses Committed On or After November 18, 1988)

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862**

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 22, 1999.

[ ] ineligible for the following federal benefits for a period of ____ ending ____:

*(specify benefits)*_____
_____
_____

**OR**

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

**FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)**

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ____ ending ____.

[ ] be ineligible for the following federal benefits for a period of ____ ending ____:

*(specify benefits)*_____
_____
_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

**Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.**

*THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.*

## STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached transcript for Rule 32 fundings.



**Guideline Range Determined by the Court:**

Total Offense Level: 28

Criminal History Category: III

Imprisonment Range: 97 to 121 months

Supervised Release Range: ___ to 5 years

Fine Range: $ 12,500 to $ 4 million

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Defendant's involvement in offense (conspiracy) for almost 2ys and possession of weapons warrant high end of range.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Docket No. 93 CR 20024 |
| Plaintiff, | ) | Rockford, Illinois |
| v. | ) | Tuesday, November 22, 1994 |
| VINCENT EDWARDS, | ) | 2:00 o'clock p.m. |
| Defendant. | ) | |

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: The court has considered the arguments made by the parties, the testimony that I've previously referred to in this trial and at the hearing, and in determining whether I should assess an aggravating role to the defendant under 3B1.1, the court has looked at the commentary and the application notes.

There's no question in my mind that he doesn't qualify under 3B1.1(a). There's no indication that he was a leader of the activity. The leaders were the Mob. The Mob was making the decisions as to how this criminal enterprise would operate.

The next question is was the defendant a manager or a supervisor, something less than the organizer or leader. And the notes say that an upward departure may be warranted, however, in the case of a defendant who did



not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization. He doesn't fall within that category. There's no testimony that he was managing assets or property or the basic activities.

So, getting down to it, I have to determine whether he was a supervisor or manager, and the case law indicates under Note 4 the factors that I should consider are about seven factors, and U.S. v. Young that I cited earlier today in one of the other sentencing hearings says I can apply it, whether it's [3] assessing between subsection (a) and (b) or subsection (c). I think these are the relevant factors. There may be others, but I'm going to list these.

First of all, the exercise of decision-making authority. Did the defendant have that? The answer is clearly no. The decisions here were made jointly by the Mob.

Second, the nature of participation in the commission of the offense. The defendant here was a worker since mid-1991, throughout 1991, and throughout most of '92. At some point he became a runner in late 1992. Then in early 1993 he came back as some sort of a worker, and I think it was he was working off some money or cocaine that he lost or didn't get paid for. A very short period of time was he an actual runner, and therefore – and even as a runner, the testimony only is that he supplied a worker under the direction of the Mob. So, the nature of participation, most of it is as a common, ordinary worker who sold on the streets. For one period of time, he was a runner – that was a short period of time – and those are

factors that I consider. I think, on balance, it doesn't help the government in that respect.

The recruitment of accomplices. There is some general testimony that runners on occasion would approve or actually recruit workers. There's no testimony that this defendant recruited any workers in the short period of time that he was a runner, and the evidence essentially is that everybody – [4] workers and runners – were approved by the Mob. So, even if somebody did recruit a worker, that is, introduce a worker, he introduced the worker to the Mob, and the Mob approved it. So, I don't see any great deal of recruitment that can be attributable to this person. In fact, there's no outright testimony of any.

The next factor that the court looks at is the claimed right to a larger share of the fruits of the crime, and that's kind of a wash because the workers get $50 a pack, the runners get $25 a pack. Again, if he was a worker most of the time, then that puts him at a level that is not a supervisor or manager. If, as a runner, he was paid $25, but could make substantially more money – and there was proof that he did make substantially more money – then that might be a point, but there simply is no testimony as to how much money he made as a runner and how long he worked and whether it was more – how many people he might have had under him. So, that doesn't help the government.

The next is the degree of planning or organizing the offense. This defendant wasn't a planner or an organizer. The Mob was. So, that's against the government.



Nature and scope of the illegal activity. His scope most of the time was selling on the streets.

Finally, the degree of control and authority exercised over others, and I think this is very important. There's [5] simply no testimony that he had any authority over anybody that he was telling other people what to do. In general, there's some testimony that a runner might tell the worker what to do, but there's really not much testimony on that point. Especially, there's no testimony as to what this defendant did.

I equate the defendant as being on the lower rung of the organizational scale, that is, the person out in the street doing the selling, and just because at one very short point in time he's a runner, it doesn't mean that even during that period of time his role was any different, essentially, than the workers, who I think were equal to him. Therefore, I do not find that he's a manager or supervisor under 3B1.1(b), and there will be no enhancement under that.

The next point I'll consider is the possession of a weapon during the commission of the offense, and the government may begin with that.

MR. ZUBA: I take it you're not going to consider a two-level enhancment [sic], either.

THE COURT: The same factors that I just stated balance equally the same way as to subsection (c).

At this time you can address the 2D1.1(b)(1) enhancement about the possession of a weapon. And I note, to shortcut this, that there are a number of times where the

defendant was seen with a gun, and you might elaborate on what the actual trial testimony was.

* * *

[6] THE COURT: Thank you, counsel.

The court will recite what the law is in this area. Under 2D1.1(b)(1), that section does not require the defendant to actually possess the firearm, that is, it may be in a house or an apartment or a car that he has control over.

Secondly, the government is not required to show a connection between the weapon and the offense. All the government is required to show is that the weapon was possessed during the offense, and I'm citing United States v. Cantero. Here I think the government has shown at least that and has shown a connection.

The evidence is that – and I believe Box when he says the defendant was a runner in the summer of 1991 – I'm sorry – was a worker at that time. And at that time he continued to be a worker, and on August 29, 1991, he was stopped, and he did have a handgun that he discarded, the .25 caliber pistol. Did it relate to narcotics? Well, the selling was going on at this time. He was a worker at this time. In addition to that, there's proof that there was selling going on, that he was doing it. He was found in possession the very next day on the 30th with three plastic baggies that tested positive for cocaine and almost $400 found in his pocket. The court believes that that shows that it's connected – even though you don't have to, it is connected to the conspiracy.



[7] The court further finds that he was stopped on July 28th, 1992, and did have a .32 caliber pistol in his front jacket at that time. Again, Box's testimony is that at that time he was a worker for the Mob.

On April 22nd, 1993, he is present in a drug house. The police raid it. Yes, he's in the bathroom at the time the police reach the top level; although, I doubt the proof shows he was going to the bathroom. He was probably trying to flush any narcotics down the toilet. In any event, they take him out of the bathroom and into the living room, and there they found a handgun which was loaded and cocked. As far as I'm concerned, he had access or authority in that particular apartment and that the gun either was his or he could reasonably foresee that that gun was used in furtherance of the conspiracy to traffic in narcotics.

Finally, the other testifying government witness, McGhee, testified that he saw the defendant with a gun, although not very often. All of this, plus since he's been in the organization from its beginning or from the beginning of Box's being involved, and all through the time until the arrest on April 22nd, he certainly knew that there were weapons. And there were numerous shootings that were testified to. He knew that weapons were involved. So, he could reasonably foresee that others would carry weapons and others were in possession of weapons at various times throughout this conspiracy. I have [8] no doubt that he was in possession of a weapon during the course of this conspiracy. Therefore, I'll have a two-level enhancement.

The next issue I want to discuss is – and the final issue, as I understand it – would be the quantities that would be attributable to this defendant. Mr. Zuba.

* * *

THE COURT: I'll begin in just a moment. I want to look at one of the trial transcripts here.

(Brief pause.)

THE COURT: Does the government have Volume III?

MR. ZUBA: I do, Judge.

(Said document was tendered to the court.)

THE COURT: Thank you.

(Brief pause.)

THE COURT: All right. The court is ready to make its factual determination as it relates to the calculation of the amount of drugs that can be attributable to the defendant. I want to say that this is a decision that the Appeals Court looks upon as the judge's responsibility, and we're to make the best calculation on the basis of the evidence before us.

As I view this prosecution and have reviewed most of the trial testimony, it appears to me that the trial testimony focused primarily upon Mob members and that the proofs were appropriately directed to those who were the leaders of this [9] particular criminal organization. As it relates to others, such as Vince Edwards, who is a worker, the court has looked at the testimony, and it is more vague. I attribute it to be because the government's



focus and their witness' focus, Mr. Box's focus, was on the persons who played the leadership roles, and it is in that respect that I find that there is not a lot of direct testimony as to what Vince Edwards did.

It's clear that he was a worker, and it's clear that he was a worker for much of the time from mid-1991 until sometime in the fall of 1992, and then in 1993 he kind of got out of that completely and then got back in for an instance in April of 1993 and then was out again.

Again, in making these determinations, the court is also concerned that because of the great disparity in sentencing between crack cocaine and cocaine, it is important to know more specifically what should be attributed to a particular defendant and, in this case, the Defendant Edwards. And so, I am very cautious when I'm looking at a sentence that is a hundred times more serious, depending upon whether it's crack cocaine or cocaine.

The court has combed the record in this case and will make these findings. I'm looking at the transcript right now of Box's testimony, and it appears to me that the first time he mentions the defendant being involved is actually in June of 1991, and at that time Box was still himself a worker, and he [10] testifies that he and Joe Tidwell and Vince Edwards were the three workers, each one having a shift. And it's stated here that Vince Edwards had the 7:00 to 3:00 shift; although, I do recall reading in the government's version that Vince Edwards had the midnight shift. But at least Box testifies on Page 35 that Edwards had the 7:00 to 3:00 shift at 411 Independence.

So, do I credit Box? Well, I credit Box, as I have throughout the trial, as telling me about the organization and telling me about who's in the organization and basically who did what. But when it gets down to the amounts that I'm going to attribute to a particular defendant, I want to make sure that there's the exact testimony that I could reasonably infer what amount of drugs should be attributed to that defendant.

This defendant was a worker, under Box's testimony, for the month of June at 411 South Independence, and they sold about – each on a shift – about four packs – I'm sorry – they sold about six ounces per week, and that six ounces would be about 24 packs. That can be reasonably inferred from what Box says, and that would total 24 ounces for the month of June, and that's 672 grams of powder cocaine.

Is there any corroboration of that? The only corroboration I do have is that there was a raid on June 4th. I think it was the 4th. It might have been the 14th, but I think it was the 4th. And at that time Edwards was inside the residence, and there were some baggies found there with cocaine [11] residue, and the defendant was arrested in those premises. Whether he was arrested for that offense isn't material. It simply corroborates the fact that he was at a drug house at that time.

The second location that Edwards was at was at West and Cunningham, and that took place in, basically, July, according to Box's testimony, and Box essentially says, "Well, we sold about the same amount as the last month," and that's typical of the general characterization of his testimony. He's not saying that he actually saw this



defendant work six days a week. We don't know if the defendant was ever sick or went on vacation or went with somebody somewhere, but he attributes the same amount, which would be another 672 grams being sold of powder during the month of July.

In the month of August, they moved to Cunningham, and the same three persons were working the same shifts, six days a week, and they sold about the same amount as they had sold the previous month. The court would note that this is somewhat corroborated by the fact that the defendant was arrested on the 30th of August, and at that time they found some money on him and three plastic baggies with powder residue. So, that evidence does support the fact that during those three months, at least, they sold, according to Box, about 672 – or this defendant on his shift sold about 672 grams, and that would be a total of about 2,016 grams.

[12] The court in the past has said, well – as it related to other cases – that because there really is little corroboration of that, and we don't know much more than he said, well, he worked for a month, we don't know much more. I have discounted it 10 percent, I have discounted it down to 10 percent, and I'm doing the same thing here. I could reach a different figure of slightly higher or slightly lower, but the court will reach that same 10 percent figure and arrive at 201 grams of cocaine that are attributable to this defendant.

There is testimony further that Edwards was a worker, continued on as a worker through 1991, and also was a worker into 1992 in the spring and summer, but there's no evidence as to what he actually did, how often

he worked, where he worked, other than the isolated testimony in June of 1992 at one time on one shift Box experienced one of the larger sales, which was 54 packs, 500 packs, at that time But he doesn't even know if the defendant worked the entire shift, and the evidence is unclear as to whether it was cocaine or crack.

This typifies the problem or dilemma that the court has; that I believe that the defendant worked during parts of that time, but I have no way to calculate it. It would be an absolute guess to say it was 1 percent, 10 percent, 50 percent, and I'm not going to speculate, particularly where it relates to crack cocaine. And the court could very well sentence this person to life imprisonment if I attribute it all to crack [13] cocaine. That simply is – it has to be shown to me, and it is not.

The only other evidence is that in October of 1992 the defendant became a runner for a couple of months, but, again, there's not a lot of testimony about that, other than it is corroborated by McGhee that the defendant attended runner meetings in late 1992 and that the defendant kept packs in the back of a yellow house in a green Nova. But it doesn't say how many packs the defendant was running or whether it was crack or whether it was cocaine, again showing this court that I'd be purely guessing as to amounts that I could attribute to him.

Finally, on April 22nd, 1993, the defendant, having been – apparently, no longer being a runner, and there's evidence that he was suspended from activities for awhile – he was working at some point on April 22nd, and he's found and convicted of having 5.32 grams of



cocaine base, that being cocaine base found in the apartment that he and several others were arrested at. I believe the other one was – was it Reynolds Wintersmith who was the other person who was arrested and charged and convicted in Count 4?

MR. ZUBA: That's correct.

THE COURT: And there there's 5.32 grams of cocaine base. So, I am considering that because that's what he's been convicted of.

But the court simply has no other corroborating [14] evidence or no evidence period to say during such and such a period of time we can attribute so much to this defendant. The government has presented me with its version of how to calculate it, but it's pure speculation or guess, and I simply cannot do that.

I do believe he was a worker during all that period of time, but it has not been shown to me by a preponderance of the evidence or by any evidence as to how I could calculate this. And I realize that there are different methods of calculation. You just don't have to find it on him. But if there were another method that I could use, I would, as I have in other cases, but here there simply is no direct evidence that I can find, after reading the record, that would give me an intelligent basis to calculate amounts attributable to him either directly or that he reasonably could foresee.

Based upon that, the court will find that there's ample evidence of 201 grams of powder cocaine and 5.32 grams of cocaine base. That would put the defendant in a level 26, and he's already had – I found that he has a two-

level enhancement after that, which would be 28, for possession of a weapon. Therefore, using those calculations, the court has a Sentencing Guideline range of 97 to 121 months, and those are the findings of the court.

If there are no questions about that, we will proceed on with the sentencing as to where I ought to sentence him [15] within that range. Mr. Zuba, any questions?

MR. ZUBA: No, your Honor.

THE COURT: All right. Mr. Redington?

MR. REDINGTON: No, sir.

(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

_____
Mary T. Lindbloom

I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

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**UNITED STATES DISTRICT COURT**
NORTHERN District of ILLINOIS

| | |
|---|---|
| UNITED STATES OF AMERICA<br>V.<br>KARL FORT<br>(Name of Defendant) | **JUDGMENT IN A CRIMINAL CASE**<br>(For Offenses Committed On or After November 1, 1987)<br>Case Number: 93 CR 20024-1<br>(Filed Dec 9 1994)<br>Michael Phillips<br>Defendant's Attorney |

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC § 846 | Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base | 07/28/93 | One |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) One, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

| | |
|---|---|
| Defendant's Soc. Sec. No.: 359-58-4686 | Monday, November 21, 1994 |
| | Date of Imposition of Sentence |
| Defendant's Date of Birth: 05-30-68 | |
| | /s/ Philip G. Reinhard |
| Defendant's Mailing Address: Metropolitan Correctional Center | Signature of Judicial Officer |
| 71 West Van Buren Street | Philip G. Reinhard, Judge |
| Chicago, IL 60605 | Name & Title of Judicial Officer |
| Defendant's Residence Address: Same | November 21, 1994 |
| | Date |



## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life Imprisonment.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be enrolled in a comprehensive drug and alcohol abuse treatment program.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

**RETURN**

**I have executed this judgment as follows:**

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years should the laws change and defendant is ever released from imprisonment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.



[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.



## FINE

The defendant shall pay a fine of $ 2,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

**DENIAL OF FEDERAL BENEFITS**
**(For Offenses Committed On or After November 18, 1988)**

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862**

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 21, 1999.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

**OR**

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

**FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)**

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ___ ending ___.

[ ] be ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

[ ] successfully complete a drug testing and treatment program.



[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

**Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.**

*THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.*

**STATEMENT OF REASONS**

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached transcript for Rule 32 findings.

**Guideline Range Determined by the Court:**

Total Offense Level: 44

Criminal History Category: V

Imprisonment Range: ___ to Life ~~months~~

Supervised Release Range: ___ to 5 years

Fine Range: $ 25,000 to $ 4,000,000.

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Life Imprisonment only available sentence under guideline manual.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Docket No. 93 CR 20024 |
| Plaintiff, | ) | Rockford, Illinois |
| v. | ) | Monday, November 21, 1994 |
| KARL VINCENT FORT, | ) | 9:00 o'clock a.m. |
| Defendant. | ) | |

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: All right. The first – before we get into the actual hearing, there are some matters that ought to by – that are of a legal nature that ought to be ruled on.

You have filed a motion for issuance of tentative findings, and that motion has been made in previous cases. Do you wish to argue that, or do you stand on your brief?

MR. PHILLIPS: I don't believe I filed a memorandum.

THE COURT: Well, your two-page motion.

MR. PHILLIPS: Well, my two-page motion sets forth the law adequately, Judge, and I just ask to be granted that we have an opportunity after you cite what you find the amount of seizures to be that I have an opportunity to make comments or evidence.

THE COURT: I will do so. The court, in the way I conduct the sentencing hearing, I believe comports with the requirements under the Sentencing Guideline Manual. I'll cite to you also United States v. Pless, which I think approves of the type of proceeding that the court conducts, as well as United States v. Osborn.

And, essentially, the court gives both sides an opportunity to present any evidence as it relates to the calculations as it relates to the amount of controlled substances, and then I have a hearing on that. I consider the trial testimony and then the testimony that we heard today, as [3] well as the excerpts from the first trial. Based upon that, I make calculations and will allow counsel a chance to address those calculations, as well.

So, I am denying the motion that has been filed as it relates to that point.

I'm looking for my copy of the objections to the presentence report. I don't seem to have those. Let me just go through my list here.

(Brief pause.)

THE COURT: All right. I have found my copy of the Defendant Fort's objections to the presentence investigation report. I'm going to take up those matters which I think relate to legal matters or factual matters that don't pertain as yet to the actual calculations.

Number one, the defendant objects to the inclusion in the presentence report of arrests which did not result in convictions of the defendant. The court will make this finding, that I will not be considering any mere arrest without a conviction as evidence against the defendant,



unless any of those arrests were the subject of testimony during the second trial, and I don't know that any were, but to the extent that there may be testimony as it relates to this defendant during the second trial – it may relate to possession of a weapon or something like that – I will consider it, but I'm not considering anything that's in the presentence report standing [4] by itself as it relates to any arrests that have not resulted in convictions.

Do I make myself clear, Mr. Zuba?

MR. ZUBA: Yes, sir.

THE COURT: And Mr. Phillips?

MR. PHILLIPS: Yes, your Honor.

THE COURT: So, I'm granting that as indicated. The second objection is that the defendant objects to the factual conclusion that would show that the defendant resided at 1308 West State Street. That is stated as the address of the defendant, I take it, at some point, or is it just the trial testimony that you're objecting to?

MR. PHILLIPS: I'm objecting to the trial testimony, Judge. At the times pertinent to the trial, he did not live at that address, and we objected all through trial as to that conclusion.

THE COURT: All right. That is a matter of credibility and weight. I will address that as it relates to at the time of sentencing, but I'm denying it. It meets the sufficient foundational basis for me to proceed as to that issue. Whether I give it any weight or not will be a matter I decide. So, I'm denying your objection as to paragraph two.

Paragraph three relates to his possession of a weapon that was apparently found in the execution of a search warrant for 1308 West State Street. That matter will be a contested [5] sentencing issue as it relates to firearms and the possession of a firearm during the commission of the offense for which he was convicted. So, I will reserve my ruling on that.

As to number four – and that's paragraph four in the motion – that also is a contested issue as to whether Mr. Fort was responsible for possession by other persons within the conspiracy, and I'll comment on that at the sentencing hearing.

Number five is an objection to the PSI calculation of a leadership role for the defendant, and that will be a contested issue that I will address at the sentencing hearing.

Number six deals with the amounts of drugs that are attributed to the defendant in the PSI. That is a contested issue that I will decide at the sentencing hearing.

Number seven is a legal objection based upon United States v. Clary, a district court judge's decision – which, by the way, has been overruled – that there's a disproportionate penalty for crack cocaine, as contrasted with powder cocaine, and that that would violate equal protection. Not only has the case that's relied upon by the defendant been overruled, but Seventh Circuit law is to the contrary of the defendant's position.

I'll cite United States v. Chandler is a decision by the Seventh Circuit. United States v. Lawrence is another case



of the Seventh Circuit, which have both rejected the argument that has been set forth by the defendant. So, I will, based [6] upon that case law, deny the objection in paragraph seven.

Paragraph eight relates to, again, the base offense level, and it points out that there has been a change in the Sentencing Guidelines, and I would agree that the Guidelines, as of November 1st, 1994, have been changed to have different classifications than the Sentencing Guideline manual in effect prior to that time. I'm not agreeing of the amount that – making a decision as to the amount of cocaine or cocaine base possessed by the defendant, but I am agreeing that the manual has been changed, and the highest he could be found to be in would be a level 38. Does the government agree with that?

MR. ZUBA: We agree that for drug quantity, the highest is 38.

THE COURT: All right. The defendant has also objected, finally, in paragraph nine to the assignment of a criminal history level of five based upon four misdemeanor convictions, and the defendant states he believes that he was convicted of only one of the four offenses, and the other three charges were then dismissed.

The court will – you said you were checking on that, Mr. Phillips. My information is what's in the presentence report, and at this time I believe it's correctly calculated, unless other charges were, in fact, dismissed. Do you have any evidence to the contrary?

MR. PHILLIPS: No, your Honor. I haven't discussed it [7] with the probation department. She showed

me certain other documents, but I have not had independent confirmation at this time.

THE COURT: All right.

MR. PHILLIPS: I have nothing to say that she's wrong, but I have not been able to independently confirm that.

THE COURT: All right. I will accept, there being no evidence to the contrary, the four misdemeanor convictions and that they resulted from separate criminal offenses on separate occasions, and, therefore, the criminal history category would be at five.

* * *

THE COURT: All right. Thank you, counsel.

The court is ready to make its findings. And, first of all, I want to indicate what I believe the scope of the conspiracy alleged is. The scope of the conspiracy is that a group formed to distribute cocaine and crack cocaine from sometime in 1991 through July 28th, 1993, and that the method used was that there was a core group, sometimes called the Mob, and that core group made the policies, contributed the money to buy purchases, and distributed the profits, and that decisions were made by this group, and they would then approve various persons who would be runners and would be workers. The court is convinced from the evidence that I've heard that there is no one leader, but, in fact, as I found in other cases, the [8] leaders were a group of people who formed for the purpose that I've just indicated.

So, in answer to Mr. Phillips' comment that for a period of time the defendant was not a member of the



core group, I think the evidence supports that for – I thought it was just a month or two, and I think it was near September or October of 1992 – but he came back into the group and in the same role that he was in before. So, I will have to determine whether he, under the facts, is a member of that group. If he is a member of that group, which I call the Mob or the core group, then I have to determine if they were all leaders.

I have preliminarily stated that they all acted together decided matters as it relates to the sale and distribution of cocaine and crack cocaine, that they all had an equal voice, they held periodic meetings for this, they split the profits, and in that way all appeared to be responsible if they were a member of the core group.

The court does find that during the period of time of early 1991 and continuing on through July 28th, 1993, that he was a core member, except for the brief period of time he was out. But he got back in, resumed the same role. And the court would further find that if one becomes a leader, he could reasonably foresee acts of the other coconspirators who were members of the core group and could reasonably foresee that runners and workers would be employed to carry out the [9] distribution of cocaine and crack cocaine and specifically that a leader could reasonably foresee conduct of the coconspirators' focus here and the scope of the defendant's agreement with the coconspirators under United States v. Edwards.

Here the evidence is overwhelming that defendant actually knew and could reasonably foresee the conduct of all the coconspirators in carrying out the plan to distribute cocaine and crack cocaine, and the court draws

these conclusions as to his leadership role from the following evidence.

First of all, Donald Box's testimony. Donald Box is, as of the fall of 1991, a core member, and Box remained a core member until July 28th of 1993. This is direct testimony of the organization, the contribution to become a core member, the splits of core members, how decisions were made by core members, by a majority vote, and the method of distribution of cocaine and crack cocaine through runners and workers. And the recruiting of the runners and workers, and the methods used to obtain cocaine, the methods used to protect their cocaine are all part of leadership decisions.

Box places defendant as a member for the period of time – as a core member for the periods of times that I've stated. And as far as the court is concerned, from listening to the testimony in trial two, it appears to me that clearly [10] Defendant Sam Tidwell and Helen Fort were major parts – major leaders, had more authority, as well as Don Box. But just the fact that somebody had more of an active role, they all – all those who joined the core group described by Box voted and participated as leaders.

And the court would also say that were Box's testimony there alone, I might be suspect because his credibility was impeached on several matters at trial, and he has an inducement to provide evidence that might be incriminating against other persons because of his plea agreement with the government. And so, I have looked at his testimony and would hesitate somewhat – I'm not saying I would discredit it, but I would say that were it



unsupported, the court would have a much closer question, but I do find his testimony in most respects, and particularly as it relates to the leadership role of the defendant, that it is credible and it is corroborated.

It's corroborated by Reginald Purvis' testimony. Purvis states that when he was working for Bingo Craig, both selling and later as a runner in 1992 and distributing cocaine, that he was told by Craig in 1992 that Craig had become a member of the Mob, and Craig told him who those members were and that the defendant was one of the core members.

This evidence is also corroborated by Purvis' own testimony that he went to meetings on Oakley and saw defendant and other Mob members there, and also he and Craig began [11] getting cocaine to sell from various members of the Mob at 1308 West State Street, from defendant once or twice and from others. And in January 1992 defendant gave him an ounce and a scale and told him to bag it up. Therefore, the court is convinced that the defendant was one of those that was a core member, not just through Box's testimony, but as corroborated by Purvis, and Purvis' testimony is corroborated by other evidence.

Also, the court recalls testimony that in the summer and fall of 1992, Purvis continued to pick up cocaine from members of the Mob, including the defendant, and that after Purvis' January 28th, 1993, arrest, the Mob talked with him, and the defendant was present, and they talked about his work and the money owed to the group and why he wasn't hanging around, and about that time he

was then discharged from any work with the organization.

In addition to the corroborating evidence by Purvis, Decarles McGhee provided credible evidence to this court. He stated that he started working as a runner in late 1992 and had to meet with those who gave him permission to work. He was introduced, I believe, to the group through a person by the name of Jones, and he could not be approved until the group approved it, the core group, and the defendant was there when Decarles McGhee was allowed to be a runner and approved to be a runner.

[12] In fact, I think the evidence, as I recall it, is that at that time when he was approved, the defendant told him that he would be a runner; that McGhee didn't know exactly what capacity he would be hired as, and the defendant told him he would be a runner. Later the defendant told him what to do on the job. He checked on him, meaning on McGhee, and when McGhee attended runner meetings, they got their instructions from the core group, and the defendant was present at some of these meetings. He was told to get a pager by the defendant so that he could keep in touch with the core members; although, McGhee never got a pager. McGhee's testimony is corroborated in some respects by the videotape – I think that's Exhibit 442 – and that shows how he got the drugs.

In addition to the corroborating of Box through McGhee and Purvis, the intercept tapes that were referred to by the government in its opening this morning clearly show the defendant giving orders and directions and



having knowledge of the overall operations of the conspiracy during the time of the intercepts in the spring of 1993. Specifically, but not excluding any others, I include tape numbers 1, 24, 35-2, and 81 referred to by the government.

Also, there is one minor bit of corroborating evidence that the Mob members took a trip to Jamaica in October of 1992, and the fact was that those persons who were alleged to be members of the core group are, in fact, all pictured and all [13] took that particular trip.

The court, examining the trial testimony, certainly believes he's a member of the core group; and, as I've previously said, the core group made all the decisions in this case. And I look at those factors that are listed under 3B1.1, Application Note 4, to distinguish a leadership and organization role from one of a manager or supervisor. There are factors that I consider, and there are seven factors. I've considered each one of those factors. And each one, the defendant fits into the category of being a leader, along with the other core members.

The next question is whether as a leader, the activity involved five or more participants. Under the case law he himself is considered one of the five, and he must have direct supervision or control or have brought in four other persons. The court will make these findings, that he was instrumental when Box joined the group as a worker at one point in time, and there's evidence that Joe Tidwell in mid-1991 and Vincent Edwards in 1991 and throughout were all directed by the defendant or other members.

So, that makes three persons, and including himself is four, and McGhee was approved by the defendant, and

that would make five, and also Purvis eventually was working and received instructions from the defendant. So, those are five or more participants.

[14] In addition, the court believes the law to be such that the five or more participants also could be members that the defendant – or people that the defendant reasonably could foresee would be brought in in some capacity as a runner or worker as directed by the group, whether to be brought in by him or someone else, and he would be responsible for bringing all those other persons in by virtue of the fact that he was a leader of the core group.

In addition, the court will find that the criminal activity was otherwise extensive, and you do look at the number of participants in the offense, whether he has control over them or some direction over those persons. And, as I've said before, he had direct control over Box for a period of time and McGhee for a period of time, as well as Tidwell, Edwards, and himself.

But I will also find that the organization had many other persons that were working at one time or another. Lockett, Joiner, Hammond, Tonka, Warren Keyes, Donnell Webb, Willie Tidwell, Willie Johnson, all those people and a lot of other persons that are named in the transcripts that I referred to and unnamed persons. This was certainly an extensive organization, and the core group controlled those persons.

So, I will find, based upon all that I have just said, that he is a leader under 3B1.1(a) and will have a four-level enhancement on the basis of that.



* * *

[15] THE COURT: Thank you, counsel.

Both lawyers have pointed out their respective positions, and I think both accurately, as to the strengths or weaknesses of the calculation by the probation officer. I have also looked at the trial transcript testimony from trial two and make the following findings.

First of all, McGhee testified that he saw defendant with a gun during the time of the conspiracy. Second, Box testified that he saw defendant with guns during the conspiracy. Third, Box said that he saw four AK-47s early in 1993 at the address on Henrietta, and defendant was there. Fourth, that at the time of the raid at 1308 West State Street on April 14, 1993, there was an AK-47 recovered and a Mack 10 machine handgun from the second floor.

There were also two nine millimeter handguns, two shotguns, and ammo from the basement. And the court has evidence that the defendant, by virtue of his identification being found in one of the apartments there and much testimony about meetings there and that Karl Fort had lived there for a period of time, that evidence leads me to conclude that he used or controlled the entire premises, except for the apartment on the first floor, at or around April 14, 1993, at the time of the seizure.

All this is – defendant's participation in guns, that [16] he individually may have possessed, is corroborated by the intercept tapes. Granted, some of them he's talking about getting a gun, but there's enough in my rereading of the intercept transcripts that he certainly – during the

course of April through July of 1993, certainly knew that guns – certainly possessed a gun on his own.

Finally, the defendant, as a leader and part of the core group, could reasonably foresee, based upon all the evidence in the trial, that other persons in the Mob would control weapons. They talked about protection of their profits, protection of their cocaine, and it's clear that at the time of Box's arrest on July 28th, 1993, and Tidwell's arrest on that same date, that a great number of weapons were found in their homes, and the defendant could reasonably foresee it. And, secondly, that those weapons, the court finds, were in furtherance of the conspiracy; that is, to protect the property of cocaine, crack cocaine, and money.

Therefore, based upon not only my finding that at various times during the course of the conspiracy the defendant himself possessed the weapons that I've indicated, he also is accountable for the weapons that were seized on July 28th, 1993, and there is hard evidence of that.

The court, therefore, will assess, in accordance with what the probation officer has found, as well, a two-level enhancement for possession of a weapon during the course of the [17] conspiracy offense.

Finally, the court will now address the base offense level, which will look at the quantities that may be attributable to the defendant. You may proceed first, Mr. Zuba.

* * *

THE COURT: Thank you, Mr. Phillips.



The court will first say that in making these calculations on the base offense level, as well as making all the Sentencing Guideline calculations, I've considered the new United States Sentencing Commission Guideline Manual, which is effective November 1st, 1994. I don't know that it would make any difference, except as it relates to the drug quantity table; and then when I say it would make a difference, the offense level there in the present manual cuts it off at a level 38, whereas I believe the Sentencing Guideline Manual in effect prior to that point goes up to a level 42, that is, it makes it higher based upon higher amounts of, in this instance, cocaine base. But, as I say, it probably works to the defendant's advantage that he can only go to a 38 under the new Sentencing Guideline Manual, whereas he could have gone to a 42 under the drug quantity provisions of the prior manual. So, I'm taking into consideration the new manual.

Secondly, I want to indicate that I have, in preparation for this and the other sentencing hearings of [18] persons in trial two, reread in its entirety Mr. Box's testimony, Mr. Purvis' testimony, Mr. McGhee's testimony, I've read the intercepts, and also the body recording testimony of Melvin Jones. I've also reviewed my trial notes, which include all the notes on the testimony of all the witnesses. And based on a review of that and based upon the comments by the lawyers in addressing me just now, I'll make the following finding as it relates to the base offense level.

I want to make it clear that in certain instances Box's testimony is not corroborated, and I have diminished amounts attributable that he attributes based upon lack of

corroboration. I want to again reiterate I believe Box's testimony as to the organization, the scope of the agreements, the persons involved, the distribution scheme, and all the other matters as it relates to the splits and who was involved and in what way. However, when it relates to the actual amounts that are attributable, his testimony is more general, more estimating, and because of that I have been conservative in my estimates, taking care that it is accurate to the best of my ability. And it is the court's duty, and I recognize that, to determine the responsibility for the quantities of cocaine and crack cocaine, and I must, to the best of my ability, make calculations so that the reviewing court can look at that as a factual matter.

The court will make these findings as follows. From [19] the April 1991 period through August 1991, the court finds that Box was a worker at that time and that he testified that the defendant was one of the leaders and supplied him with cocaine. Box testified that he sold about five packs of dime bags a shift. He estimated that that was about 24 packs a week in his shift and that there was three shifts going on.

If that is accurate – and that is his testimony – that would total approximately – 24 packs equals six ounces, and if I take it that there are three shifts, which he testified to, that would be 18 ounces a week, that that period of time from April 1991 through August 1991 is 20 weeks. There would be a total of 360 ounces of cocaine sold during that period of time. That totals ten kilos of cocaine.

It was sold from an address on Mulberry, an address at 414 South Independence, an address at West and



Cunningham, and at another address. I'm not sure if it was on Horsman or where it is, but it was in the evidence. And the only corroboration of that is that there was a raid on – I believe it is either June 14th or June 4th on South Independence, and the defendant was there outside, and Vince Edwards and some others were arrested inside, and some small quantities of cocaine were discovered.

But that's about the only corroboration, and because of Box's estimates, the court is being very conservative and will find that only 10 percent of his testimony is accurate; [20] and, therefore, I will, for the purposes of determining the quantities, determine that there was one kilo of cocaine that can be attributed to the defendant through his leadership role in the organization, and that's what I'm basing not only this calculation, as far as this amount, but all the other amounts that I find are because of the defendant's – I've already found that he is a leader, and I further find that because he's a leader of this core group, he had knowledge, he reasonably could foresee all the purchases and the sales, and that he could – and that these were all in furtherance of the conspiracy and within the scope of that conspiracy.

The alternative to the court in finding 10 percent of the amount, as I've attributed for April through August of 1991, would be simply to say, well, I attribute all, or I attribute none, and the court has done its best judgment in saying, well, there's some corroboration, although very little. I also believe what Box has said, but I'm being very conservative in estimating it at 10 percent. Therefore, one kilo will be attributable to the defendant in this respect.

From September through January 1992, Box's testimony is that Helen Fort purchased cocaine at two or three kilos per month. If I took the low figure of two kilos a month, that would add up to eight kilos of cocaine. The court, for the purposes of calculating the amounts, again, is really relying on Box's testimony. There is some corroboration by Purvis, who [21] does testify that during the fall, late fall of 1991, and early January 1992, he was selling and running. And so, that corroborates to some extent the nature of the organization and the nature of the sales. That's about the only testimony that there is.

There is testimony that is corroborated that Box was stopped in Arkansas in March, and although that falls a month or two outside that time frame, he was stopped with $4,000 cash, and I think Russell and one of the Tidwells were stopped also about that period of time with $1400 in cash; and, as far as I'm concerned, that corroborates that near that period of time these people were dealing in fairly large quantities.

There's also some testimony by Walker of his sales during that period of time. This was another witness that just testified in this trial. I forgot his first name.

MR. ZUBA: Terrence.

THE COURT: Terrence Walker. And he does corroborate that.

On the basis of that, again, the court feels that an all or nothing approach would not be the appropriate approach. I can estimate, because of some corroboration, that four kilos of the eight kilos that Box estimates, I will



calculate as being attributable to the group, and, as such, the defendant reasonably could foresee it.

As to the purchase – the next period of time is [22] basically in the spring and summer of 1992, and these focus around the purchases from Sherman Ollison. The court has heard evidence that there was a – locally, at least, there was a lack of supply, that it had dried up in about that period of time. So, they attempted to get supplies from a different supplier.

The testimony by Box is that Sam Tidwell purchased one kilo from Ollison in the spring of 1992, that Box and Willie Tidwell purchased three kilos – and, again, this is money coming from the group – and that this occurred sometime after Mother's Day of 1992. That another purchase was made from Ollison by Willie Tidwell and Reynolds Wintersmith, and that was three kilos, and that was a couple weeks later. And that, finally, two weeks after that, Willie Tidwell and Willie Johnson, with Mob money, went to purchase three kilos, did purchase three kilos from Ollison, and they were stopped, and the three kilos were seized. This was corroborated by the testimony of officers from – I believe it was Scott City, Missouri, who testified as to that seizure.

In addition, there's one kilo that – or Ollison was himself stopped in Chicago. There was testimony that three kilos were taken from a suitcase that he had, and the government stipulates that one of those kilos was bound for the group here in Rockford, and that's confirmed by Box's testimony that that shipment from

Ollison was designed to make its way to [23] the Rockford group. That's a total of eleven kilos that are attributable to be from Sherman Ollison. That's what Box says.

What evidence is there to corroborate that? Well, first of all, there is the testimony of the seizure in Chicago of the three kilos. So, that corroborates that particular shipment. The court further finds that there was a seizure of three kilos from Willie Tidwell and Willie Johnson, and that corroborates that. Therefore, the court believes that all of the supplies coming from Ollison that were testified to by Box can be verified. Because of the other seizures, I tend more to believe Box that the eleven kilos comes from Sherman Ollison, as testified to.

In addition, there's testimony about large amounts of Mob money being collected to pay the bonds for Willie Tidwell and Willie Johnson, and that shows that the Mob was interested in this. Purvis also testifies as to the large amount of cocaine being distributed and crack cocaine during this period of time, and so does McGhee testify as to the large extent of what was going on, and that would verify the fact that they needed a large supply of cocaine.

As to how I'm going to attribute that, Box's testimony is that the majority of it was for crack cocaine. The court has previously found in the other sentencing hearings that I heard on the first trial that I believe that about half would be attributable to cocaine and half to crack cocaine. The [24] court would note that today Box testified two-thirds is what he means by a majority. I think that's subject to speculation, and, therefore, the court attributes 50 percent to crack cocaine and 50 percent to



cocaine, which means five and a half kilos of cocaine and five and a half kilos of crack cocaine.

Now, obviously, up to this point, there's a sufficient amount that meets the 1.5 kilos in the Guidelines Manual to put the defendant at a 38 level. On the other hand, I must make additional findings because the evidence is before me, but certainly the amount is now there that would place him in a category 38.

The court heard testimony that from the summer of 1992, also in 1993 until the date of the arrests, various amounts were purchased from Ilander Willis. Box testified he purchased two from Willis in the spring of 1992 that was no good. The court will credit that because there was evidence that during that period of time they needed a large amount of cocaine.

In addition, he said that in 1993 he got cocaine in kilo quantities from Willis, and today he testified that that would be about – I believe he said six or seven kilos that he got from Willis. The court will attribute six kilos to the group – from that to the group. I'm not going to attribute any more because it's speculative, it's general. But I do believe that at least six can be corroborated by the following [25] evidence.

First of all, on May 28th of 1993, there's a seizure of almost one kilo of crack cocaine, and that corroborates both that a large amount was being distributed at that time, which would support that a large amount had to be supplied, and, secondly, it also supports the fact that crack cocaine was being made in large quantities, and that residence – it was seized at the residence of Gloria

Holmes, and the evidence shows by Box's testimony that it was stored there by Montie Russell.

Montie Russell was the boyfriend of Ms. Holmes, and Montie Russell, the evidence shows, was a part of the leadership group, and Box had been there and seen Montie Russell take amounts from a quantity that was hidden at that home, and he also was there one time when Russell went up to get some, and he didn't accompany him, but he waited outside in the car. And there's sufficient link to the organization not just by Box's testimony, but there are calls to Gloria Holmes that were intercepted which show Sam Tidwell talking to her and Montie Russell talking to her that links, at least, the seizure on May 28th, that this group was concerned about that.

The court further finds that the intercepts from the period of April through July 28th, 1993, clearly show the extent of the organization, the activity of sales and distributions. The government has referred to some of this in [26] their closing argument, but the court will simply state that there's ample evidence through those tapes that this organization was distributing on a large basis, and there's further support that quantities were obtained from Ilander Willis based upon those intercepts.

Again, to show corroboration of the amounts that were being sold during the 1993 period that had to be supplied, and the court finds were supplied from Willis, is the testimony of Purvis about the amounts that he was running, the amounts that McGhee testified he was running, and McGhee was also arrested with some money and drugs on him; that drugs were seized in a garage on



July 28th where the Mob met – several Mob members lived, and they operated sales out of that area.

There are tapes, body recorder tapes, of Jones that show defendant's involvement and the quantities that were involved in that situation. There were baggies seized on numerous occasions, numerous raids, throughout the 1993 period, and in one – after the defendants were arrested, Box testified that at one Mob house there was a huge bag containing over 40,000 baggies that were to be used to sell crack cocaine in. This is corroborated by the fact that somebody reported that, and the police did seize that large quantity. And that house was controlled by the Mob, and that was at 1123 West State.

There was a large amount of money and drugs that were found or a large amount of money and some drugs found when Box [27] and Sam Tidwell were arrested on July 28th, which corroborates the extent of this organization. There's some surveillance evidence that shows the extent of the operation. The pagers and cellular telephone evidence shows that this was a sophisticated operation during that 1993 period, all tending to show that this was a large organization. They needed a supply, and it would credit Box's testimony as to the amounts.

The April 14, 1993, search warrant for 1308 West State, they found large amounts of money, and that was in one of the bedrooms. I think there was about $4900 in the southeast bedroom and then 2,000 in a drawer in the southeast bedroom. I found that Box was there, but even – I'm sorry – I found that Karl Fort had control or possession over that premise, but even if he didn't, it's clear that other members of the Mob used that place, and

that large amount of money shows to me that there was a large amount of dealing in cocaine and crack cocaine. The trash evidence also supports the significant quantities being arranged for distribution through the organization.

In short, I've detailed all this evidence, and the court, again during that period of time of the 1993 sales, will attribute 50 percent to crack and 50 percent to powder, all of this getting to quantities significantly over 1.5 kilos.

And the court has been asked to consider the heroin distributions in 1992. The court has been asked to consider [28] other purchases that may have been made by Mob persons from Pierson and Sockwell. There hasn't been the definitive testimony that would establish those. They're unnecessary, anyway, and the court would find that I need not calculate that and do not calculate it. I don't find there's sufficient credible evidence that that has to be included within the calculations to put this person at a 38 level.

The court would also find that his mere absence from the organization for two months doesn't materially affect my calculations. He was there and planning all along, and the court is satisfied that during that period of time that he withdrew, there were no significant purchases that would subtract from the totals that I have calculated.

Therefore, based upon the evidence, based upon my findings – and I'm finding beyond a reasonable doubt that these amounts would be calculated as I've indicated – puts him at a 38 level.

* * *



THE COURT: The government has supplied me with – and you, as well, Mr. Phillips – with a certification of the conviction for misdemeanor offense on June 23rd, 1989, as to the possession of less than 2.5 grams of cannabis, which is reflected in the presentence report, and that was the matter under some contention, and that is at lines 414 through 420.

In addition, the probation officer has secured [29] certified copies of the other convictions that have been relied on by the probation officer to justify the.points that have been allocated for criminal convictions. Both of these shall be a part of this record. You've received a copy from the probation officer, as well?

MR. PHILLIPS: Yes, I have, your Honor. Do you have original signatures on your document, just for the record?

THE COURT: Well, I have an original – you mean by –

MR. PHILLIPS: For the certification.

THE COURT: (Continuing) – the defendant? I not only have the certification, but I also have – they have copies of the docket, which includes a copy of the defendant's signature on a guilty plea. At least I'm looking at the first one. Yes, I do have a certified copy signed by the Clerk of the Circuit Court of Winnebago County.

MR. PHILLIPS: Thank you, your Honor.

THE COURT: These will remain in the file then. Based upon that, there being no other objection, I will find that the defendant is in a criminal history category of five.

We're at the stage on the Sentencing Guideline calculations, I've made my calculations tentatively on the base offense level, that is, as to quantities. Did you wish to state anything more in that regard, counsel?

MR. PHILLIPS: Just briefly, your Honor. With regards to your findings, your Honor, we appreciate your finding of no [30] allocation for the presence of heroin. The only thing we would ask is that there was testimony that Mr. Fort was not a part of the conspiracy in the months of – I think we decided on September and October.

THE COURT: I believe the record shows that he went out sometime in September or October and came back about a month to two months later.

MR. PHILLIPS: And you gave him credit, basically, for one kilogram of cocaine powder, I believe, in each of those months. We would ask that the finding be reduced as to Mr. Fort because he was not actively involved in any way with this alleged group during those months. Therefore, the amount of cocaine attributable to his conduct should be reduced by the amount for those two months.

THE COURT: Did you wish to respond to that?

MR. ZUBA: Just simply by stating that Mr. Phillips is mistaken. There was no reduction for him not being a part during that time period because that was 1992. Your discounting that was done pertained to the fall of 1991 time period. As far as the calculation of cocaine purchased during 1992, it was not reduced at all. We don't think it should be reduced at all. It was based on



purchases. The purchases didn't occur during that two-month period.

Furthermore, the test is whether or not it would be foreseeable to Karl Fort, and just because he isn't a part at [31] that time, he made no legal withdrawal, and there is no reason to believe that any additional purchases would be foreseeable to him. But the bottom line is you didn't compute any purchases during that two-month period.

THE COURT: The court recalls my findings, and the purchases that were attributable from Sherman Ollison were all prior to that period of time, and the purchases from Ilander Willis were prior to that time. The other purchases took place in 1993. So, number one, I didn't attribute any purchases during that period of time.

Secondly, under United States v. Edwards, the court can consider that a person who might drop out from a conspiracy and rejoin – or someone who just might join at a period of time shortly after some transaction occurred – the court can, if it's really foreseeable to a defendant, consider a prior transaction and attribute that to that person.

In my opinion, this defendant was out of the conspiracy only for a short period of time. He got back in knowing what had happened in the past and what he intended to do in the future, which was the same thing that had been done since 1991. Therefore, I would not reduce my calculations by any during the time that he was out of the conspiracy for a month to a month and a half.

With that, are there any other questions as it relates to the Sentencing Guidelines?

[32] MR. PHILLIPS: No, your Honor.

(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom



**UNITED STATES DISTRICT COURT**
NORTHERN District of ILLINOIS

| | |
|---|---|
| UNITED STATES OF AMERICA<br>V.<br>REYNOLDS WINTERSMITH<br>(Name of Defendant) | **JUDGMENT IN A CRIMINAL CASE**<br>(For Offenses Committed On or After November 1, 1987)<br>Case Number: 93 CR 20024-18<br>(Filed Dec 9 1994)<br>Craig Sahlstrom<br>Defendant's Attorney |

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One and Four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC § 846 | Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base | 07/28/93 | One |
| 21 USC § 841(a)(1) | Possess With Intent to Distribute Cocaine Base | 04/22/93 | Four |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) One and Four, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 318-64-8784

Defendant's Date of Birth: 07-07-74

Defendant's Mailing Address:
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, IL 60605

Defendant's Residence Address:
Same

Wednesday, November 23, 1994
Date of Imposition of Sentence

/s/ Philip G. Reinhard
Signature of Judicial Officer

Philip G. Reinhard, Judge
Name & Title of Judicial Officer

NOV 23 1994
Date



## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life Imprisonment on Count One and Forty (40) Years on Count Four (to run concurrently with Count One).

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

**RETURN**

**I have executed this judgment as follows:**

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years should the laws change and defendant is ever released from imprisonment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.



[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.



**FINE**

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

**DENIAL OF FEDERAL BENEFITS**
**(For Offenses Committed On or After November 18, 1988)**

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862**

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 23, 1999.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

**OR**

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

**FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)**

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ___ ending ___.

[ ] be ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

[ ] successfully complete a drug testing and treatment program.



[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

**Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.**

*THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.*

**STATEMENT OF REASONS**

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached Rule 32 findings

**Guideline Range Determined by the Court:**

Total Offense Level: 44

Criminal History Category: I

Imprisonment Range: ___ to Life – Count I 40 yrs – Count IV months

Supervised Release Range: ___ to 5 years

Fine Range: $ 25,000 to $ 6 million

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Life Imprisonment required under guidelines. No reasons for downward departure.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Docket No. 93 CR 20024 |
| Plaintiff, | ) | Rockford, Illinois |
| v. | ) | Wednesday, November 23, 1994 |
| REYNOLDS WINTERSMITH, | ) | 1:30 o'clock p.m. |
| Defendant. | ) | |

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: Thank you.

The court has carefully considered the testimony at trial and has reread the pertinent transcripts and looked at the case law and listened to the arguments of counsel and will have these remarks in making the factual findings that are necessary.

The evidence that Reynolds Wintersmith was a leader or organizer under 3B1.1(a) is primarily from the testimony of Donald Box, and I have considered that testimony and have considered the fact that in several respects he's been impeached through his grand jury testimony, and also several of the facts don't necessarily correspond to the times that Mr. Box testified to, and I think, thirdly, much of his testimony was in general, but he did testify as to the specific role that each person

played who became a so-called member of the inner group, sometimes called the Mob, and the court has – if I had solely the testimony of Donald Box before me, it would be a very, very close question as to what I would find.

The testimony of Box, I've looked at it and tried to figure out if he had a reason to lie, why would he be putting Reynolds Wintersmith into the inner core. There's other people that he easily could have put into the inner core group, and he's not done so. He's testified that from time to time members left the inner group. And so, at least looking at his [3] testimony, I find that it becomes somewhat credible because I can't figure out why he would put Reynolds Wintersmith in if he wasn't in, but still the court looks at it very, very carefully.

It's Box's testimony that the defendant joined the group, the inner group, in April of 1992, and from that period of time – at which time Wintersmith had to pay some money to get in – and from that period of time, he remained a member of the inner group until they were all arrested on July 28th of 1993, except for a period of time when Reynolds Wintersmith and Karl Fort left the group, after some disagreement, for a month or so around September or October of 1992.

And it is Box's testimony that whenever somebody joined the group that that person had to pay money, and once they paid the money and became a member of the inner group, then that person shared in the profits on an equal basis and voted along with the other people on various matters that came up for a vote as it relates to the conspiracy that's charged.



The corroboration of Box's testimony comes by virtue of another former member of the conspiracy, but not a member of the inner group, and that's Decarles McGhee. He began working for the group in late 1992 as a runner, and he attended several meetings, and the defendant was there. He did testify that the defendant told him he better get a gun and that when bagging was done by the Mob members that he saw, meaning Decarles [4] McGhee saw, defendant was there.

McGhee also testifies that three months before the arrest, defendant and other Mob members subbed as runners for a period of time, which may explain why Reynolds Wintersmith was in the house when he was arrested on April 22nd, 1993. And, finally, on cross-examination the defendant – or he, McGhee, says defendant was a Mob member throughout the time that he, McGhee, was working. I don't know why McGhee would necessarily lie to put Reynolds Wintersmith in there. For example, when asked about Joiner, he said, "I didn't ever see him, didn't ever have any contact with him." What I'm saying is if McGhee was trying to put people within the leadership or try to incriminate other persons, he didn't do it when he had the opportunity.

If the argument could be made that Box and McGhee were lying just to help the government and looked at the indictment and saw who the government was after and then made up their story, they could have given much better testimony against certain of the defendants, and they didn't. They chose not to say that certain defendants were either Mob members or did work for the group.

So, in a sense, McGhee corroborates the testimony of Box. And for very little weight, but some weight, is the fact of the trip to Jamaica, and although it is about the time that the defendant supposedly is out of the inner group, there is a [5] trip that the leaders took, and the defendant was one of those persons.

The court, therefore, believes and will find that the defendant was a member of the inner group, that he became a leader because they all – that group then, once you became a member, they voted by majority vote. They had a contribution they had to make to get in the group. They had to split profits. They regularly attended meetings. They approved runners and workers. And it's clear from my recollection of the testimony that there's no one person in charge, that is, there's no evidence that, say, just Karl Fort was in charge.

I do believe that Karl Fort, Donald Box, Sam Tidwell, and maybe Michael Gillespie were three of the more dominant figures; that is, personality-wise, they seemed to have been more active in the sense of they're on more tape recordings and appear to be more active. But all of these, including the defendant, were making the decisions, and in any group you sometimes find some people who are more vociferous and a stronger personality, but I believe under the evidence the defendant, even though he was 17 years old, joined the group, probably seeing what money they were making and was given that opportunity.

As further support, I have looked at the Guideline test under 3B1.1, and that sets forth certain factors that the court ought to look at, and I look at these factors to



see [6] whether the defendant is an organizer or leader or whether he's a manager or supervisor or whether he's none of those. And first I look towards the exercise of decision-making authority, and under the facts – at least Box testifies, and so does McGhee corroborate this for part of the time – that for slightly over one year, the defendant was making jointly decisions that the core leaders made to determine the operation of the charged conspiracy, and that factor goes against the defendant and would show that he is a leader.

Next I look at the nature of participation in the commission of the offense, and I think he, like others, directed those who were runners and workers, and he was working full time at this illegal activity, except for one or two months. So, while he wasn't an original organizer and he came into the organization at a later date for a year's period of time, he was voting on the decisions. So, I think the nature and participation in the offense was extensive.

The recruitment of accomplices. I could find no direct evidence that he recruited individuals or none that he didn't. All Box said was generally that they, the Mob, recruited runners and workers. So, I don't think that cuts either way. If it cuts any way, it helps the defendant on that factor.

The next factor is the claimed right to a larger share of the fruits of the crime. Well, the core members divided the [7] proceeds equally with the other core members, and this certainly was more than the runners and workers

were paid on a commission basis. So, believing that testimony of Box and McGhee, I find that against the defendant.

Fifth is the degree of participation and planning or organizing the offense. Well, it was organized, as I said, by Box and/or at least initially by Fort and Tidwell. Box then became involved and later the defendant. So, while he wasn't involved in the organization, he later became involved in the planning of all the subsequent events from April 1992 'til his arrest. So, that works against the defendant, and it shows that he may be a leader.

The next is the nature and scope of the illegal activity, and this was a vast organization, and he was at the top. So, it indicates that he was a leader.

Finally, the degree of control and authority exercised over others. Generally, the leaders told everybody else what to do. That's according to Box's testimony. I found very little in the record to support that the defendant was telling anybody what to do, except on one occasion McGhee took orders, and McGhee was one on the lower echelon. So, there is some evidence that he was giving orders, and that tends to show that he's a leader.

The court, based upon those conclusions of fact, would find that he's a leader, and the next decision I must make is [8] whether he supervised others, that is, whether he, as a leader, that it involved five or more participants, and for him to be charged with a four-level enhancement, it must be shown that he supervised not only himself, but four other persons. And all I can find is that he might have on one occasion supervised McGhee.



On the other hand, there is law, I think – although, not completely settled in this circuit – but looking at United States v. Brown at 31 F.3d, the court may consider whether if he is a person who's a leader, does he have – can he reasonably foresee what other persons would do in the recruitment and directing of other persons, and if he knew that other members of the Mob were going to supervise and recruit other members, then he would be responsible if it could be reasonably foreseen and that it was done in furtherance of the conspiracy. And certainly Edwards, Vince Edwards, Dexter Hammond, Joe Tidwell were all recruited, along with McGhee, and that's four persons right there, and the defendant himself makes five. So, if you use that theory, he would be supervising four or more participants.

In addition to that, however, I find that under subsection (a) he can be responsible for an increase if the activity involved was otherwise extensive and other persons were involved in the criminal activity over which he may not have directly exercised authority, but who were a part of the [9] criminal activity. And certainly in this case, besides himself, McGhee, Vince Edwards, Joe Tidwell, Dexter Hammond, Joiner, Tonka, Lockett, Lillian James, and many, many others were part of this criminal activity and were, therefore, showing that there were great numbers of people that were involved, and he would be responsible for those, as far as I'm concerned.

And based upon that then, I would find that he is a leader, and he does fall within 3B1.1(a). Even though his involvement or his personality or his activities were not as extensive as Box's or Tidwell's or Karl Fort's, he still had the same role in making the same ultimate decisions.

They just might have said more and done more. Therefore, the court must impose a four-level enhancement.

As a result of that and because of those findings, I would deny the motion for a downward departure that he played a minor or minimal role. That is simply not justified under the facts.

All right. The court will next consider the possession of the weapon. Mr. Zuba.

* * *

THE COURT: Thank you, counsel.

The court will make the following findings as it relates to 2D1.1, and the court is taking into consideration the entire trial again and my recollection of the evidence.

[10] On March 20, 1992, defendant was arrested, and at that time there's no question that he had a weapon in his waistband, and he threw it to another person. I think it was a person by the name of Pascal. The court, therefore, clearly has him in possession of a weapon. The only other requirement is that it occurred during the offense, and the case law – and I cite to U.S.A. v. Cantero – provides that 2D1.1(b)(1) does not require the defendant to actually possess the firearm; that is, it may be constructive possession. And here, for this incident, it's not constructive; it's actual possession.

Secondly, the government is not required to show a connection between the weapon and the offense. All the government is required to show is that the weapon was possessed during the offense. And looking at the comments under 2D1.1, Comment 3 states in part that the adjustment should be applied if the weapon was present,



unless it's clearly improbable that the weapon was connected with the offense, and the example they cite is the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. And they pretty much – the Seventh Circuit has limited the exception to that type of factual situation.

Now, this is a little bit different because the crime is a continuing crime, it's a continuing conspiracy, and the court believes there has to be shown some sort of connection. And I believe that the connection is made by the fact of Box's [11] testimony and the fact of McGhee's testimony and the fact of other intercept tapes that at about this time, the activities of the organization were going on, and there were a great many people in the organization. There were shootings at or about March 20th, and those shootings are by rival gang members and for people trying to horn in on the drug trafficking. So, I think there is a connection, based upon all the evidence, that at least that weapon was carried in connection with the offense.

On April 22nd, 1993, the defendant is arrested in a home where a loaded weapon is found in the living room. Reynolds Wintersmith, I think, is going up the stairs about the time that the police come in. So, it's reasonable to assume that Reynolds just got there. But the purpose of that place was – and there were narcotics ultimately found – was they would sell drugs. And at that time McGhee, at least, testified that he believed the defendant could have been operating as a runner about that time. Even though he was a Mob member, certain people acted for certain periods of times as runners. Be that as it may, I think it's reasonably foreseeable to Reynolds Wintersmith under all the evidence that that weapon could have been

there at that particular drug house where money was found and some quantity of drugs.

The May 26th, 1993, incident at 119 North Henrietta, there was a shootout. The police were called. They do find [12] Reynolds Wintersmith in the attic area or the second floor in a bed. Weapons are found in a separate room. I don't think under the circumstances it's been shown to me to be actual possession, and, second of all, I don't think there's been enough shown to me as constructive possession of that weapon. On the other hand, could he reasonably foresee it? Defendant goes there regularly. It was a meeting place. And, as far as I'm concerned, due to the fact of all the evidence in the case, weapons were present for the very reason that that incident happened that night, to protect themselves, and there happened to be a shootout.

Finally, McGhee also testified that he saw the defendant with a weapon during the course of this conspiracy. And so, all those instances show the defendant to have possessed a weapon of the ones I've just stated. In addition to that, at the time of Tidwell's arrest, Sam Tidwell and Box's arrest, weapons are found in their homes, and I think that it is reasonably foreseeable, and those weapons were reasonably foreseeable to the defendant, that these two possessed weapons and, secondly, that those weapons were possessed in furtherance of the offense, that is, that they were used for protection.

Therefore, the court must impose an enhancement of two levels under this particular subsection, and I do so.

Mr. Zuba? Next.



MR. ZUBA: Drug quantity.

[13] THE COURT: I beg your pardon?

MR. ZUBA: Drug quantity then.

THE COURT: Yes, that's the only – as I understand it, that's the only one that would be left.

* * *

THE COURT: Thank you, counsel.

The court has already found that Mr. Wintersmith was one of the leaders of the group, being a core member, and, as such, the court would further find that he can reasonably foresee the acts of other coconspirators who were members of the core group, and he could reasonably foresee the acts of runners and workers who were carrying out the distribution of cocaine and crack cocaine.

And, specifically, the reasonable foreseeable conduct of the coconspirators must focus on the scope of the defendant's agreement with the coconspirators under United States v. Edwards, and here the scope of the conspiracy was from early 1991 through July 28th, 1993, to distribute cocaine and crack cocaine and that it was distributed through an organizational effort where a certain group, that I've referred to as the core group, organized it. They got runners to distribute to the workers to sell it on the streets. They insulated themselves as core members; that, for the most part, they kept in communication by cellular telephone or pagers; that they had weapons to protect their stash of narcotics and [14] their money; and that this was operated out of various houses throughout the West End of Rockford.

Here the evidence is overwhelming that the defendant, as a core member, knew or could reasonably foresee the conduct of all those in the conspiracy – not just the core members, but those who were working as runners and workers – that they were carrying out the plan to distribute cocaine and crack cocaine.

Therefore, based upon that, the defendant would be responsible for those quantities of cocaine or crack cocaine which are sold or obtained by the group for sale. And the court has previously found that he joined the conspiracy as a member of the core group in early – or in the spring of 1992.

The purchases to the group at that time, the purchases that is, that the group made, as Box testified, in the early spring, Sam Tidwell buys one kilo from Sherman Ollison. I'm not going to attribute that to the defendant because it's too close to the period of time he became a core member. When they say the spring, I don't know when that is necessarily. It's too general.

On the other hand, the court will find that Box gave credible evidence that around or slightly after Mother's Day in 1992, Box and Willie Tidwell bought three kilos from Sherman Ollison for the group and that several weeks later Willie Tidwell and Reynolds Wintersmith went to Texas and bought three [15] kilos and brought it back, and then two weeks after that, Willie Tidwell and Willie Johnson bought three more kilos, and they were caught by police in Missouri and that three kilos were seized by the police.

In addition to that, on May 6th, which is before Mother's Day, but after the time that the defendant



became a part of the inner group, there was a seizure in Chicago of three kilos from Sherman Ollison, a person identified as Sherman Ollison, and Box verifies that, and Box verified in trial number one that only one of those kilos was designated for the group in Rockford of which the defendant was a member. Therefore, I can attribute a total of ten kilos to this particular core group in which the defendant was one of its members.

The evidence of ten kilos is corroborated by testimony of the seizure of those three kilos in Chicago, the seizure of the three kilos from Willie Tidwell and Willie Johnson that I mentioned. There are cashier's checks and other testimony how they attempted to obtain bond for Willie Tidwell and Willie Johnson. There's Purvis' testimony of the amounts that were being distributed at that time and McGhee's testimony of amounts later when he became a part of the organization that they had supplied.

As far as I'm concerned then, there's adequate corroboration that ten kilos were brought into Rockford for [16] sale. The question then is what were those – they were brought in in powder form. How much do I attribute to crack, and how much do I attribute to powder? And this is a key decision that I've had to make throughout the various defendants because crack cocaine being – the penalty being so much more onerous, the court has used a conservative figure of 50 percent cocaine and 50 percent crack. I have done that because although Box testified on several occasions, he gives general testimony and then says, well, it was two thirds and then mostly, and then in some cases he said it's primarily, and other times he said it's the majority.

I do believe the evidence supports that crack cocaine was being distributed at that time and so was powder cocaine, and on that basis I'm going to allocate 50 percent of the ten kilos to crack cocaine and 50 percent to powder cocaine. That in itself is over 1.5 kilograms, and that is enough to put the defendant in a 38 base offense level. The court must make further findings as to whether other crack was brought in or other cocaine was brought in from other sources.

The testimony is that Ilander Willis in the summer of '92 and throughout 1993 supplied cocaine to the group. The testimony by Box is that two kilograms were supplied in the summer or spring of 1992. I have no reason to doubt that. I think it's believable, considering the amount of cocaine being sold at that time, and I will allocate two kilos to that, one [17] kilo being crack and one kilo being cocaine, for the reasons that I've said earlier.

The court also heard testimony that six or seven kilos were provided to the group from Ilander Willis in 1993. That is an amount that I think is verifiable and corroborated by the following evidence. First of all, there's a seizure of almost one kilo of crack cocaine on May 28th, 1993, at Gloria Holmes' house, which although she not being a member or a part of the organization, it was stored there by her boyfriend, Montie Russell, who was a part of the core group, and that I think there are calls by Sam Tidwell and Montie Russell at about the time of the seizure which link – in addition to Box's testimony – link this crack cocaine to the crack cocaine that was being distributed by the conspiracy here. That alone is a large quantity of crack cocaine, which is indicative that if that



amount is being stored, there's a lot more, as evidenced by the other testimony. So, that supports Box's testimony.

In addition, the wire intercepts that occurred from April to July 28th, 1993, show the extent of the organization and the activities and the sales, including crack cocaine and powder cocaine, and Willis' name appears in several of the tapes, and in several of the conversations he himself is talking about the sale. So, that verifies the fact that he was making sales to the organization.

Purvis' testimony shows the amounts that he was [18] running, which is a large amount. McGhee was working from the fall of 1992 through the time he was arrested, and when he was arrested, he was found, I think, with crack, powder, and heroin – small amounts, but it verifies the fact that crack cocaine was still being dealt in that area on July 28th. Drugs were seized in other raids on July 28th where Mob members were involved. It shows their link to cocaine and cocaine base being distributed.

The body recorders and tapes on Jones show quantities of cocaine were still being arranged for during that spring and summer of 1993. There's baggies seized in various arrests throughout the West Side during this period of time and other matters that were unrelated to the raid on the 28th of July, but all those baggies show an active distribution method. And in one circumstance, they found 40,000 baggies that Donald Box testified to and were actually found at a house – I think it was 1123 West State Street. And there were many – on many of the people were found pagers or in their homes pagers and

cellular phones, and there's evidence of surveillance, evidence of telephone calls on a frequent basis, which shows the extent of this organization.

Finally, drugs were found in other various raids, not just on the 28th, but drugs were found at various times when the local police made arrests of these members or confederates, and trash evidence supports the significant quantities of drugs [19] which were being distributed.

Therefore, I can conclude that – I believe that there's sufficient evidence to support that eight kilos were sold by Ilander Willis to this organization, and I can attribute, based upon all those facts, at least four of those kilos to crack cocaine and the other four to powder, inasmuch as Decarles McGhee said he was dealing about equally in both, and I've used a conservative estimate based upon that testimony as it relates to determining whether it ought to be allocated to crack or powder.

Therefore, based upon all those findings, the defendant is clearly, by virtue of the crack cocaine and his knowledge that he could reasonably foresee that, it's an amount substantially over 1.5 kilograms of cocaine base, and, therefore, he would fall within a level 38, and I'll make that finding.

The court has then completed the objections that have been made. Are there any others that I have not treated?

MR. SAHLSTROM: No.

THE COURT: Mr. Zuba?



MR. ZUBA: Not that I'm aware of, your Honor.
(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

[20] I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom

_____

**UNITED STATES DISTRICT COURT**
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

HORACE JOINER

(Name of Defendant)

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

Case Number: 93 CR 20024-12

Donald Sullivan
Defendant's Attorney

(Filed Dec 9 1994)

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC § 846 | Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base | 07/28/93 | One |



The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such court(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) One, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: Unknown

Defendant's Date of Birth: 07-28-63

Defendant's Mailing Address:
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, IL 60605

Defendant's Residence Address:
Same

Tuesday, November 22, 1994
Date of Imposition of Sentence

/s/ Philip G. Reinhard
Signature of Judicial Officer

Philip G. Reinhard, Judge
Name & Title of Judicial Officer

November 22, 1994
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Twenty-Six (126) Months.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be incarcerated in an institution nearest to Rockford, Illinois that does not have any cooperating defendants in this case.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.



## RETURN

**I have executed this judgment as follows:**

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled



substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.



## DENIAL OF FEDERAL BENEFITS
## (For Offenses Committed On or After November 18, 1988)

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862**

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 22, 1999.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____
_____
_____

**OR**

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

**FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)**

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ____ ending ____.

[ ] be ineligible for the following federal benefits for a period of ____ ending ____:

*(specify benefits)*_____
_____
_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

**Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.**

*THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.*

## STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached transcript of Rule 32 findings.



**Guideline Range Determined by the Court:**

Total Offense Level: 28

Criminal History Category: IV

Imprisonment Range: 110 to 137 months

Supervised Release Range: ___ to 5 years

Fine Range: $ 12,500 to $ 4 Million

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Midrange sentence reflects his involvement and prior criminal history.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Docket No. 93 CR 20024 |
| Plaintiff, | ) | Rockford, Illinois |
| v. | ) | Tuesday, November 22, 1994 |
| HORACE JOINER, | ) | 9:00 o'clock a.m. |
| Defendant. | ) | |

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: The court now has completed the testimony as it relates to the Sentencing Guideline calculations, and I would first say that since there have been no other objections to the Guidelines and also no objection to the facts, Mr. Sullivan and Mr. Joiner – other than you contest the facts that are set forth as it relates to the government's version. Are there any other facts that you contest?

MR. SULLIVAN: Yes, your Honor. I checked this morning over at the Clerk's Office, the Winnebago County Clerk. They were unable to provide a docket entry for an alleged conviction for obstructing a police officer – or obstructing justice and trespass.

If the Probation Department has a copy of the docket sheet for that, we would appreciate it. If not, then we



would interpose an objection as to the sentence enhancement included in the presentence report.

THE COURT: Which one? Turn to your presentence report and tell me which one you're objecting to.

MR. SULLIVAN: Going through the Worksheet C –

THE COURT: Well, wait a minute. Go to Page 10, the defendant's criminal history. Isn't that what you are addressing?

MR. SULLIVAN: Yes, that can be found in several places.

[3] THE COURT: Right. Let's go through 10, 11, 12, 13, and part of 14.

MR. SULLIVAN: It would be line 453 on Page 12.

THE COURT: Do you have a certified copy of a conviction or a copy of the docket?

MR. OSBORNE: Your Honor, that's what I'm looking for. What happened on that one, they were consolidated. That's why he didn't receive any points for the 10-10-85 battery and criminal trespass because it was – so, I've got a feeling that it might have ended up under that case number, 5804.

THE COURT: What you're saying is the conviction you have attributed one point to on line 453, which is saying he pled guilty – and I don't know whether he pled guilty to the battery or the obstructing the police officer – was consolidated for sentencing with the offense on line

468, and it appears that both offenses were – the defendant was sentenced on 10-17-85

MR. OSBORNE: Correct.

THE COURT: So, you have not attributed any points to the latter conviction that occurred on 10-10-85, but you have on line 453 as to the battery and obstructing a police officer that occurred on 7-22-95.

MR. OSBORNE: Correct.

THE COURT: Do you have a –

MR. OSBORNE: Your Honor, that information from that [4] particular one, I'm looking for the Clerk's, but the information I have was provided by the State's Attorney's Office on their – which I don't think I can –

THE COURT: Well, are you contesting that he was convicted of that 7-22 offense?

MR. SULLIVAN: We would ask that the Probation Department would provide the verified copy of the conviction. I checked the court records, and I was unable to find any –

THE COURT: Well, it sure would have helped if you would have called this to our attention before this.

MR. OSBORNE: That's not what they asked for in their objection, your Honor.

MR. ZUBA: I still don't hear that he's making an objection. Is he saying it didn't happen?

THE COURT: Well, I get an objection that he's objecting to that one point being assessed.



MR. ZUBA: Well, he ought to claim on the record that it didn't occur if he wants to object to it.

MR. SULLIVAN: I'm sorry? I didn't –

MR. ZUBA: I think –

THE COURT: Well, are you objecting to that?

MR. SULLIVAN: I'm objecting to the one point assessment if we're unable to provide a verified copy of the –

THE COURT: Well, you haven't – I'm in the middle of a sentencing hearing, and I have another sentencing hearing [5] this afternoon that's going to take all day, and I'm tied up all day Wednesday with sentencing hearings. That's why you make objections ahead of time.

I'm going to do this. I'm going to find that it appears to me to be accurate. There's no other information that's been submitted that it's inaccurate, other than you saying, "Well, I checked over there," and you couldn't find it. I'll ask the Probation Office and the government to see if they can find a certified copy or provide a certified copy –

MR. OSBORNE: Yes, your Honor.

THE COURT: (Continuing) – but I'm going to proceed on with the sentencing hearing and if the probation officer at a later point comes back and says that point shouldn't be attributable to the conviction because it never was a conviction, then they can call it to my attention, and I'll recalculate it, but I'm going to proceed ahead with the sentencing hearing.

Now, was there some other objection that you had?

MR. SULLIVAN: No, your Honor.

THE COURT: All right. I want to tell you this, that as far as other arrests that didn't result in convictions, I'm not considering those. Those start on line 557 and go through until 639, but I'm not considering those.

Let's take up at this time then your objection to the Sentencing Guideline calculation of criminal history. I [6] believe you had an objection to that.

MR. SULLIVAN: That's correct, your Honor.

THE COURT: And that is at the bottom of the next to the last page of your objections, and it reads you object to the criminal history points as calculated by the government crediting Mr. Joiner with one point for the October 17, '85, conviction of obstructing a police officer and criminal trespass to land is inappropriate. The imposition of a point for a relatively minor transgression unfairly inappropriately enhances the punitive effect of the federal drug statute. The credit of the conviction for state misdemeanors results in an outcome which far exceeds the punitive intent of both the state criminal statute and the federal drug act. Such accumulation amounts to double jeopardy.

As far as I'm concerned, the Sentencing Guidelines do take into consideration misdemeanors as qualified if they meet either the amount of time in jail or they reach the appropriate level of probation or supervision. Here I've already credited – pursuant to your oral objection, I've already said that absent somebody showing me that there wasn't a valid conviction for the offense listed on



line 573 – I'm sorry – 453, that shall be counted, and we're not counting the other offenses that he pled guilty to and was sentenced on that date. So, I make these rulings that the criminal history category is correctly calculated.

[7] Would it make any difference, Mr. Osborne, if there were one less point?

MR. OSBORNE: I believe he would then have a criminal history of six, and I believe –

THE COURT: One less point.

MR. OSBORNE: Yes.

THE COURT: Six points.

MR. OSBORNE: He'd have a total of six, and he's a four now, and I believe he would be a criminal history category three.

THE COURT: All right. Well, I'm considering him as a four, absent any evidence that that one conviction on line 453 should not be counted.

MR. ZUBA: So the record is clear, the evidence in support of the conviction, as per the probation officer, is information from the files of the State's Attorney's Office, which was in the county where the conviction was secured.

MR. OSBORNE: Yes.

THE COURT: All right. Well, I expect over the lunch hour that somebody will verify that.

MR. OSBORNE: Correct.

THE COURT: All right. That takes care of that objection.

I'd like to proceed now, if you both agree, with the other objections that are raised to the Sentencing Guideline [8] calculations. Is that agreeable with the government?

MR. ZUBA: It is, Judge.

THE COURT: Is that agreeable with you?

MR. SULLIVAN: It is, your Honor.

* * *

THE COURT: All right. The court is ready to rule on both objections made or the objection made that he's not a leader.

First of all, the court has looked at 3B1.1, and while the government seeks a two-level increase under subsection (c), it seems to me, to be consistent – if they were to be consistent – that he was a manager or supervisor. You're not contending he's a leader or an organizer. You're contending, aren't you, that he's a manager or supervisor?

MR. ZUBA: Yes, Judge.

THE COURT: If he was a manager or supervisor, he probably would qualify under (b), not (c), because it is shown to be an otherwise extensive organization. But the court, in determining whether he is a manager or supervisor, looks at the application notes, and in particular I look at Application Note 4, and under Application Note 4 there are various factors that the court is to consider in distinguishing a leadership and organization role from one of mere management or supervision. So, that's the test.



Now, at first blush it seems like, well, that is [9] applicable to determine whether he qualifies as an organizer or leader, but the case law from the Seventh Circuit – and I cite United States v. Young, 34 F.3d 500 – these same factors are employed also to determine whether a defendant qualifies as a supervisor or manager at all. So, I consider those factors as it relates to whether he plays a manager or supervisor's role.

Looking first at the exercise of decision-making authority, I don't think there's evidence that he was in the decision-making authority. He took orders from Box and the core group.

Secondly, the nature of participation in the commission of the conspiracy offense. He is involved only for a limited period of time when he was released from jail May 7, 1993, and the conspiracy ended July 28th. So, he's only there for a limited period of time. As far as I'm concerned, he was never a worker, and I don't find that he's a runner from the evidence. His function, in my judgment, was to in some instances do some enforcement for the organization, and in a limited way he was hanging around all the time – he apparently wasn't employed – and he would inform Box or tell other members of the core group that they're out of supplies. He would also hang around, as Box said, but he was there. He wasn't paid, from any evidence that we have. So, under that factor, I don't find that to assist in qualifying him as a manager or supervisor.

[10] Recruitment of accomplices. There's no evidence of this. The fact that he went out on one occasion and came back with some workers to beat somebody up isn't,

to my knowledge, recruitment. We don't know how he got them. We don't know anything more about the incident.

Fourth, the claimed right to a larger share of the fruits of the crime. The evidence is that he didn't get any. Obviously, he didn't participate in splits. There was no indication that he was paid like a worker or like a supervisor. There's simply no evidence of it. Therefore, that factor doesn't help this court in determining that he is, in fact, a manager or supervisor.

The degree of planning or organizing the offense. Again, his involvement appears to be at a point where he carries out the orders of somebody else.

Number six is the scope of illegal activity. Really, his activity, in my judgment, is disciplining some of the people who didn't pay off their debt, either runners or workers, and that's the extent of it. That doesn't show a supervisor capacity.

Finally, the degree of control or authority over others. I think it's stretching it, as I said before, that the incident when he got some other people to beat up Blackie McGhee – I don't think that one incident shows that he had a leadership role. The fact that the taped conversations that [11] Mr. Zuba has referred to are evidence of his involvement in the conspiracy, but, in my judgment, don't show that he was a manager or supervisor, particularly when there's no evidence that he ever controlled runners or workers. Therefore, the court, based upon the evidence that's before me, will not find that there should be any enhancement as to his role in the offense.



The defendant has requested a downward departure of either four levels or two levels under mitigating role, 3B1.2. The court finds that subsection (a), the four-level decrease, applies to a defendant who is plainly among the least culpable of an organization, such as an occasional worker, in my judgment, or a security person under the evidence or one who is involved in one incident.

Here the court finds that the defendant had direct access with the core members of the Mob, had enforcement responsibilities that he undertook from time to time. He was present at locations where transactions were occurring. So, it's beyond just a single transaction that's contemplated for a four-level reduction as stated in the commentary note. I find that he was involved for a significant length of time in various activities of the conspiracy.

As to subsection (b), a minor participant, that is one who is a participant who's less culpable than most other participants, but whose role is not minimal. His activities [12] are consistent with others that are not a part of the core group. His activities are consistent with other persons who worked on and off for the organization, both workers and some of the runners. All these people worked in some way or other for the organization and were given orders, and this defendant falls within the category not less than those other persons.

In fact, as the government points out, his role appears to be a little more active than just a worker in the sense of activities of a more dominant role in the organization. And I only say that because the workers are probably there on a daily basis. He wasn't working on a daily basis, but he had greater access, apparently, to the

leaders, and, therefore, he knew what was going on, and he's not entitled to any reduction for a mitigating role.

The court has made its rulings on that, and I will now proceed to the dangerous weapon enhancement.

* * *

THE COURT: Thank you, counsel.

The court will make the following findings as it relates to whether there should be a two-level enhancement under 2D1.1(b) (1), and that's if a dangerous weapon was possessed, then it's increased by two levels. And it's not used; it's possessed.

The court will find that there's no evidence that the defendant himself directly possessed a weapon, and both Box and [13] McGhee testified that they never saw him with a weapon. The evidence then boils down to as to whether he could reasonably foresee that weapons were carried by others in furtherance – or possessed by others in furtherance of the conspiracy.

There's no question in my mind that Sam Tidwell, under the evidence, possessed this weapon that's shown in Exhibit 201-A and that he possessed it during the time of the conspiracy and possessed it at the time that he was arrested in his home, that it was found in his home, along with both cocaine and other weapons and money. Therefore, it is certainly clear that it was possessed by him during the offense, and it's connected to the offense.

A firearm is generally used to protect oneself, and in this drug trafficking it's to protect the money or the illegal substances. And the court just wants to cite the law, U.S. v. Cantero. It says that an enhancement under



2D1.1(b) (1) does not require the defendant to actually possess it – it may be in a home or an apartment or a car – nor is the government required to show a connection between the weapon and the offense. All the government is required to show is that the weapon was possessed during the offense, and I think there's a connection here. It's stronger as it relates to Samuel Tidwell.

In addition, the most recent case I have found, United States v. Linnear, states that if the weapon was present that [14] the Guidelines state that this enhancement should be applied if the weapon was present unless it is clearly improbable that the weapon was connected with the offense, and that's the limited exception that is talked about in the notes and is talked about by counsel, if it's in a closet and it's a hunting weapon. Well, this isn't a hunting weapon. This is a weapon that was used to protect the persons and the property of drug dealers.

Now the question remains is whether the defendant here should be responsible for the conduct of another coconspirator under the theory as to whether he could reasonably foresee that this gun would be possessed during the commission of the offense. The picture that has been shown to me, 201-A, has the defendant, along with two other persons, both of them posing with guns, one of those being Sam Tidwell, who has a pistol that's later located at his home at the time of his arrest.

The court further acknowledges other evidence in this record that shows the defendant is around those who are participating in the drug transactions. The defendant is an enforcer, and there are various tapes that show he's – at least on one tape he's talking about a clip to a

weapon. It would be unreasonable not to infer that he knew that this weapon was a part of protection for the members of the organization.

I simply can infer from all the evidence as it relates to this defendant that he could reasonably foresee that this [15] weapon was possessed during the course of the offense and would be carried by another person who he knew as one of the leaders of this organization, and it's carried in furtherance of the criminal purpose for which the defendant was convicted. Therefore, the court will enhance two levels under that particular Guideline.

The next Guideline that I want you to address goes to the base offense level, and the government may proceed.

* * *

THE COURT: The court is ready to make its factual findings as it relates to the base offense level.

First of all, as to whether the defendant should be responsible for the quantities that the government has attributed to sales in, let's say, June of 1993 at the location at Ma & Pa Beasley's, the court will first say this, that I've considered my role is very important as far as the responsibility I have to determine to the best of my ability from the evidence what quantities can be attributable to a particular defendant, and in doing so, again, I've reviewed the entire trial, as well as the testimony that I've heard today.

At trial, Decarles McGhee, who is a government witness and who was an active runner during the time that the defendant was associated with the conspiracy – and that's from May 7 until July 28, 1993 – McGhee was an



active runner. He attended runners' meetings. He was in and around the West [16] State area, which is near Ma & Pa Beasley's, and he says that he never saw Joiner in connection with this offense. He knows nothing about Joiner. And I say that is evidence that would run contrary to Joiner being responsible for sales in that area because McGhee was an active runner and was working in that area, and he never saw him – McGhee never saw him at Mob meetings or never saw Joiner in possession of drugs or a gun.

Purvis, although he was out of – another government witness – but Purvis was out of the distribution at that time. He didn't know Joiner, and he was in jail for part of the time, but he was out by May 10, but he was not active in the group at that time. So, all I can say is that he doesn't help either side, except in a minimal way would be he would have heard of it on the street, but he said he never heard of Joiner or heard of anybody talking about Joiner.

Critically then, I must look at Box's testimony and look at the tape evidence, as well. Box on cross-examination stated flatly that the defendant never dealt in drugs. Now, that's cross-examination during the trial. He also said that the defendant never cooked or bagged cocaine. He wasn't involved in splits. He wasn't a member of the Mob. And he never saw the defendant with drugs.

What he did state is that for a couple of – for a few weeks, he let him, Box, or Horton know if workers were out of work. That's what he stated at trial. Essentially, today he [17] backs off of that a little bit. He said, well, Joiner was just around, and if somebody was looking for

a runner, maybe they'd come up to Joiner, if he were there, and Joiner would tell the runner or tell somebody else to get a runner.

There's no question in my mind that Joiner is around during this period of time and that he knows somewhat what's going on, but the extent of his involvement, beyond the enforcement aspect, which is backed up in the tapes, is just a matter of speculation. To attribute the large amounts of cocaine and cocaine base that Box says were distributed by another person, Horton, during that period of time and then say, "Well, Joiner ought to be responsible for a part of it," is just stretching it too far.

First of all, I have some doubts as to the credibility of Box on that issue, and, therefore, I find it very difficult to attribute amounts of cocaine, particularly cocaine base, where he would be getting a life – near a life sentence if I accept the arguments of the government, and he being involved only for two months, and everybody acknowledges he's not a part of the leadership. They don't even give him a particular role in it. I just have some very, very serious doubts as to the credibility of Box. He's tried to generalize – in this instance.

I believe him, his credibility, in a lot of what he's said, but as to estimating the amounts and what he might [18] estimate that Randy Horton sold at that time and what he guesses that the defendant might have done at the location is simply too speculative to attribute cocaine or cocaine base to him. And particularly when he says, well, at one point it might be 75 percent was crack. It's just too speculative and the consequence is too great for this court, for the limited role that the defendant had in



the matter, to say that it's been proved. It might be a fact. Maybe he has a greater involvement, but it simply has not been proved to me.

As to the amounts that the government also seeks to attribute to him as far as certain packs that Box says were given by Joiner to Parker, that is corroborated by the tape. There is corroboration of that, and it is such that I believe that there was a transaction that Parker hadn't paid off, and the defendant was attempting to collect that, that it is one pack, but there's no evidence that that was crack cocaine, but it is powder cocaine.

I will find that Tape 71-1 corroborates Box's testimony. And while the court recognizes that corroboration is not necessary, that I can believe the testimony of a person without corroboration not just on this issue, but any issue, the court, given the nature of Box's testimony and the generalities as it relates to the quantities, I am doubtful without some corroboration. So, therefore, I find that approximately seven grams of cocaine the defendant is [19] responsible for as it relates to the transaction with Parker.

There also is a second transaction with Relly, who is a brother to Antonio Craig. That is one pack. It's been testified to by Box that it is crack cocaine, and one pack would equal one-fourth of an ounce, and that is approximately seven grams. And I say approximately because there's no measurement of these particular amounts. I recall that that testimony, Box's testimony, is in part corroborated, and I believe it's on Tape 71-1, but I want to check that. Is that the government's recollection that it's 71-1?

MR. ZUBA: Yes, Judge.

THE COURT: That is a conversation between Antonio Craig and Horace Joiner, and I think that that does verify the fact that there was an amount that Craig's brother had to pay off, and that amount I will find to be one pack, based upon Box's testimony, and based upon Box's testimony it's crack, and I think, as I say, the tape verifies parts of Box's testimony, and, therefore, I will credit it all. And that is approximately seven grams of crack cocaine.

The other is one pack of crack cocaine that is attributable to a Michael, and that is corroborated by Tape 53-2, and the testimony from Box is that it's one pack, and that was trial testimony, and then his testimony here is that it's crack. I believe that testimony. It is corroborated by the tape. And that's approximately a fourth of an ounce or [20] approximately seven grams.

There is testimony of Blackie McGhee being beaten up for the collection of cocaine that he owed or crack cocaine. The court is not – that's too nebulous at this point to see exactly when it was owed, when the defendant – what the defendant's knowledge was as to that. I don't think it makes any difference because looking at the Guidelines, I'm approximating 14 grams, and I'm approximating it because the Witness Box says, "We didn't weigh it, but we kind of cut it."

So, even if I were to attribute seven more grams or approximately seven grams to this McGhee incident, that would total approximately 21, and I would not – and that would move him up over 20, and I'm not about to say



that the testimony has been with that much precision that it could and should increase the level for the defendant.

I'm going to find that there's approximately 14 grams of crack cocaine that are attributable directly to the defendant from the two sales, the one with Relly and the other one with Michael, and that's the extent that is provable, as far as I'm concerned. Now, that provable amount being what the defendant is directly responsible for, he shall then, based upon possessing – I believe it's five grams to twenty grams – he falls within a category level, I believe, of 26. Five grams, but less than 20 grams of cocaine base, is a level 26. That's the level that I find. I find it's between that of [21] those amounts. The fact that he possessed – also found that he had seven grams of cocaine powder does not increase it in any way that it would get into a higher level.

Therefore, he falls at a level 26. My calculations are that he then has two additional levels for possession of the weapon. That's a level – total of level 28. He then is in a criminal history category of four. The court then goes to the sentencing table, and he faces a term of imprisonment of 110 to 137 months.

Are there any questions about those calculations? I want to make sure that – after I have made my decisions, I want to make sure that the lawyers understand then what the range that I find is available.

MR. ZUBA: No questions from the government, Judge.

THE COURT: Do you understand where the range is?

MR. SULLIVAN: Yes, your Honor.

THE COURT: All right. At this point in time, I believe I've answered all the objections that you've had; is that correct, counsel?

MR. SULLIVAN: That's correct, your Honor. (Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

[22] I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom



**UNITED STATES DISTRICT COURT**
NORTHERN District of ILLINOIS

| | |
|---|---|
| UNITED STATES OF AMERICA<br>V.<br>JOSEPH TIDWELL<br>(Name of Defendant) | **JUDGMENT IN A CRIMINAL CASE**<br>(For Offenses Committed On or After November 1, 1987)<br>Case Number: 93 CR 20024-8<br>Richard Butera<br>Defendant's Attorney<br>(Filed FEB 6 1995) |

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One, Five, and Six after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC § 846 | Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base | 07/28/93 | One |
| 21 USC § 841(a)(1) | Possession With Intent to Distribute Cocaine Base | 04/30/93 | Five |
| 18 USC § 924(c) | Used and Carried a Firearm in Relation to a Drug Trafficking Crime | 04/30/93 | Six |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 150.00, for count(s) One, Five, and Six, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

| | |
|---|---|
| Defendant's Soc. Sec. No.: 355-58-1330 | Wednesday, January 18, 1995<br>Date of Imposition of Sentence |
| Defendant's Date of Birth: 08/21/63 | /s/ Philip G. Reinhard<br>Signature of Judicial Officer |
| Defendant's Mailing Address:<br>Metropolitan Correctional Center<br>71 West Van Buren Street<br>Chicago, IL 60605 | Philip G. Reinhard, Judge<br>Name & Title of Judicial Officer |
| Defendant's Residence Address:<br>Same | February 6, 1995<br>Date |



## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Two Hundred Fifty-Two (252) Months on Count One, Two Hundred Forty (240) Months on Count Five to run concurrent with the term of imprisonment on Count One, and Five (5) Years on Count Six to run consecutive with the term of imprisonment on Count One.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be incarcerated in an institution nearest to Rockford, Illinois, if security concerns permit it. Defendant should be enrolled in a comprehensive drug treatment program.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

## RETURN

**I have executed this judgment as follows:**

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years on Count One and Three (3) Years on Count Five to run concurrent with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report to the probation office in the district to which the defendant is released within



72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall receive drug aftercare treatment at the discretion of the probation officer.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.



## FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

**DENIAL OF FEDERAL BENEFITS**
**(For Offenses Committed On or After November 18, 1988)**

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862**

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending January 18, 2000.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

**OR**

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

**FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)**

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ___ ending ___.

[ ] be ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

[ ] successfully complete a drug testing and treatment program.



[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

**Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.**

*THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.*

**STATEMENT OF REASONS**

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): disputed guideline calculations. See Attached Transcript for Court's Rule 32 findings.

**Guideline Range Determined by the Court:**

**Guideline Range Determined by the Court:**

Total Offense Level: 36

Criminal History Category: II

Imprisonment Range: ___ to ___ months

Count I – 210 to 262 Mos; Count V – 20 yrs; Count VI – 5 yrs consecutive

Supervised Release Range: ___ to 5 years – Count I; 3 years – Count V years

Fine Range: $ 20,000 to $ 4,000,000

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Near Maximum of range based on involvement in offense over a long period of time.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

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IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) Docket No. 93 CR 20024 |
| Plaintiff, | ) Rockford, Illinois |
| v. | ) Wednesday, January 18, 1995 |
| JOSEPH TIDWELL, | ) 1:15 o'clock p.m. |
| Defendant. | ) |

EXCERPT OF PROCEEDINGS
(Rule 32 Findings)
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES:

| | |
|---|---|
| For the Government: | HON. JAMES B. BURNS<br>United States Attorney<br>(211 South Court Street,<br>Rockford, Illinois 61101) by<br>MR. JAMES T. ZUBA<br>Assistant U.S. Attorney |
| For the Defendant: | MR. RICHARD M. BUTERA<br>(6072 Brynwood Drive,<br>Rockford, Illinois 61114) |
| Also Present: | MR. BRIAN BARTHOLMEY<br>Special Agent, FBI |
| | MR. RICHARD BOCKOVER<br>Probation Department |
| Court Reporter: | Mary T. Lindbloom<br>211 South Court Street<br>Rockford, Illinois 61101<br>(815) 987-4486 |

[2] (The following is an excerpt of proceedings:)

THE COURT: At this time then we'll take certain matters up that are contested that relate to the Guideline calculations. The first matter I'll take up, as I indicated before the lunch break, was the objections to the criminal history category.

I've read the defendant's objections. He objects to all three points set forth in the presentence report under criminal history, and the defendant has set forth his reasons. The probation officer has filed a supplemental report as it relates to those, and I don't know whether the government responded to that or not. I've forgotten.

MR. ZUBA: We did not file a written response, Judge.

THE COURT: All right. I'll give each lawyer a chance to argue those, but to shortcut it, I might give you an idea of my preliminary ruling. That way you can focus in on that, if you care to do so.

Defendant's first criminal history point is for a conviction on 8-23-85 for obstructing a police officer. There is an objection by the defendant as not being a listed offense and that there was no probation or jail sentence of at least 30 days. The court will just say that under 4A1.2(c) it says that, "Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if, A, the sentence was a term of probation of at least [3] one year or a term of imprisonment of at least 30 days or, B, the prior offense was similar to an instant offense."



The court, in looking at the offense of conviction, obstructing a police officer, would find that that appears to be along the lines of hindering or failure to – I believe – well, let me – I looked at this earlier. The offense of conviction is listed as what? I'll ask the probation officer this.

MR. BOCKOVER: Obstructing a police officer, Judge.

THE COURT: And what is it specifically in the state criminal prosecution? What does it allege?

MR. BOCKOVER: It's alleged that he interfered with a police officer who was trying to interview a car thief or a suspect in a car theft.

THE COURT: Interfered with him in what way?

MR. BOCKOVER: The criminal complaint only says he interfered with the officer who was trying to question a suspect in a car theft.

THE COURT: I'm going to find based upon that that that constitutes hindering a police officer, and because it's a listed offense, it can only be counted if that offense was similar to the instant offense, which this is not, or if the sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days. It is neither of those. So, that point I would preliminarily state should not have been [4] assessed. Does the probation officer now, after looking at it, agree with the court?

MR. BOCKOVER: I do, your Honor.

MR. ZUBA: The government agrees, also. So, there's really no reason to argue it.

THE COURT: All right. Thank you.

The next I will take up is the conviction on 11 – well, it looks like the plea of guilty was actually 11-6-87. The offense occurred 11-12-86. And that is listed on Page 13 of the probation officer's report as that the plea of guilty was to the resisting charge. The resisting charge would be a listed offense. Therefore, it cannot be counted unless the defendant received a term of imprisonment of at least 30 days, and that isn't the case here, or the sentence was a term of probation of at least one year.

Here the imposition was one year conditional discharge. Conditional discharge, as set forth in the supplemental report of the probation officer, is considered a sentence by which the defendant is obligated for certain conditions. It says, "A criminal justice sentence means a sentence countable under 4A1.2 having a custodial or supervisory component; although, active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included, but a sentence to pay a fine by itself would not be included."

[5] I agree with those conclusions and that the essence of this is an equivalent to a term of one year probation. Do you wish to add anything further to that?

MR. BUTERA: No. I just would say that it's clear in the Guidelines it says probation. It's not probation. And a conditional discharge is not reporting to anyone. I mean, you could have court supervision where that's not even a conviction where you have to – you're under some terms and conditions.



But I think that if they wanted to make it clear as to what it would be, something other than probation – because, obviously, different states have different rules in terms of the types of dispositions – it would have included those types of dispositions, at least some definition in the Guidelines. It can't be any more clear than what the sentence says, probation, and it's not probation. So, in those terms I would say that it should not apply.

THE COURT: Do you wish to add anything from the government's point of view?

MR. ZUBA: No, Judge. We just believe that conditional discharge is synonymous under this section with probation and should be considered to fall within that category.

THE COURT: All right. The conditional discharge under state law is essentially they can impose conditions on it or not. It's just not a formal probationary sentence. So, the [6] court would find that one point was correctly added by the probation officer.

The next offense is listed as an arrest on 6-15-88, and on 11-8-88 the defendant was sentenced to 30 days' custody. The charge upon which he entered a plea of guilty to was reckless conduct, and reckless conduct is not a listed charge.

And would the probation officer – as I recall, this was firing a weapon inside a house, which was alleged in the state court information to have endangered someone else who was in the house.

MR. BOCKOVER: Yes, sir.

THE COURT: All right. That would appear to be one that's not listed, and even if it were listed, the defendant received a 30 days' sentence for that. Mr. Butera, what further argument do you have there?

MR. BUTERA: I guess the way I read this section – and I guess there's two different ways that you could read it. I read it as that it has to be – in order to give any points for a misdemeanor, it has to be one of the listed ones, and that would be my position as to the way it reads here. Any type of misdemeanor has to be listed here, and then it has to meet the two categories, either/or.

And I understand what probation is trying to say. Any misdemeanor offense – these are exceptions. But that's not the way I read this section. What they're saying is any type [7] of misdemeanor, if it's not listed, then it doesn't matter what the sentence was. It's a conviction. You could have a day in jail, you could have a hundred dollar fine, no matter what it is. You don't have to meet any requirements. If you're under a listed offense, you have to meet these requirements.

My position is that in order to count a misdemeanor, it has to be listed here first, and then it has to meet those conditions. So, it's just a matter of interpretation of the statute. That would be my position.

THE COURT: Does the government want to respond to that? What's your position as far as whether it's listed or not listed?



MR. ZUBA: Well, our position would just follow the reading. It states that, "Sentences for misdemeanor and petty offenses are counted except as follows," and as follows is the paragraph one with all of the listed offenses. So, a misdemeanor generally is counted, unless it's listed, and if it's listed, you go to A and B under that section. So, I think that Mr. Butera's reading is not consistent with the language.

THE COURT: All right. Well, I will find, as I indicated, that it's not one that's listed, and even if it were listed, he got 30 days in jail, and so it would count. So, it counts on both bases. Therefore, I will add that point as set forth by the probation officer.

The net result is it really doesn't change the [8] criminal history category. It only changes the number of points, the number of points being two, and since there are two points, it falls within the criminal history category of two, and I'll make that finding. That's the only contest as far as criminal history category goes.

* * *

THE COURT: All right. The court is ready to rule. Again, this isn't a specific Guideline that I'm ruling on, but it will give the court and counsel the focus of proving up other Guideline calculations.

As I indicated throughout the sentencings of other defendants, Donald Box I believe generally was truthful in his testimony about the organization of the cocaine distribution conspiracy, how it operated, who were the people involved, and who were the members, and I said that absent corroboration that the court would have a

close question as to each individual case because of Donald Box's interest in receiving favorable treatment by the government for his cooperation, and he received substantial benefit. He would have been facing a life sentence himself had all the information come forward through some other witness to implicate him.

In any event, I look at each case for each defendant separately, and in this case, in reviewing the facts, I again point out that it is Donald Box's testimony which says that this defendant became a part of the inner group in either late [9] April of 1993 or early May of 1993. All other persons have been involved in this conspiracy for quite some time, and this defendant alone through Box's testimony is that he became involved in the actual – as a Mob member in the time frame that I've indicated; although, he says that the Defendant Tidwell was a worker and did other things for the conspiracy beginning as early as 1991. The issue is, for various purposes, whether he became a Mob member in May of 1993 close to the time when the Mob was terminated because of their arrests.

The court has looked in all the other cases, as well as this case, as to whether there's corroboration, and in all the other cases there's been corroboration generally by not only one witness, but several witnesses, and sometimes the tapes have corroborated the fact that a person has been a Mob member. Principally, I'm speaking that Purvis has generally corroborated who's been a Mob member, as well as Decarles McGhee, and then the tapes sometimes corroborate that. The court here has to look at, again, the motivation of Box in his testimony and the



whole relationship of Box and Tidwell to the conspiracy that was going on.

The corroboration in this case is lacking as to Purvis. He really got out of the – stopped dealing with the conspiracy in February of 1993. And the one thing that I think is significant is that during the time that he was involved [10] before that, he doesn't say he was taking any orders from Tidwell, and, again, Box doesn't say that Tidwell came in until May.

But what is significant is that Tidwell was present the night that Purvis was called on the carpet by the Mob members for some infractions and was disciplined by – he was disciplined by the Mob members, and Joe Tidwell was present at that time. Now, even Box doesn't say he's a member of the Mob. Yet, Joe Tidwell is there when members of the Mob are inflicting discipline on Reginald Purvis. And in addition to that, at least it's Purvis' testimony, and I believe it, that during the course of this disciplining, he's hit over the head with a bottle by the defendant. This again is sort of inconsistent. If he's not a Mob member, why is he there, and Box on the other hand doesn't say he's a member at that time.

What it points out to me – and other evidence – what it points out to me is that Tidwell is a brother to Sam Tidwell, who is a Mob member, he's a cousin to the Forts, as I understand it, the testimony is Helen and Karl Fort, and he's been with this organization involved in the conspiracy for some time, but his role is not the same. He's been selling, and he's present, and maybe it's because of his family relationship that he's allowed into the places where normally a non-Mob member would not

be allowed. But for whatever reason, he's there, and maybe that explains his frequent conversations on [11] the recorded telephone wiretaps.

In any event, we don't have any corroboration by Purvis, like he corroborated the testimony that other persons were members of the Mob. And, in fact, as I just said, he tells a role that the defendant had which appears to have been one very close to members of the Mob without being one.

Next is Decarles McGhee. Decarles McGhee is a runner for the Mob, and he remains a runner up until the time that he's arrested along with everybody else in the end of July 1993. There's no testimony by McGhee, who's certainly in a position to know and named every other person as a member of the Mob, did not name Joe Tidwell as a member of the Mob, and that's significant as far as the court is concerned. In addition to that, his testimony, as I pointed out earlier, was that Joe Tidwell purchased crack cocaine from him, and that is inconsistent with a role of a person who's a leader in the Mob.

The other supposedly corroborating evidence that the government points to, the tapes – and I've reread each one of those taped conversations. It does show a close relationship that this defendant has with members of the core group or the Mob, but it doesn't show me that he is a member. It just shows a very close working relationship, which is consistent with the testimony of Purvis that he was with the active members, but there's no evidence that he was a Mob member.

The court, therefore, has to find whether he is a [12] member of the Mob, whether it's been shown to me that



he joined as a member of the Mob in May. It's a close question, and I've indicated the reasons that there's no corroboration; but, in addition to that, the latest testimony that Box told the – at least in an FBI statement that, well, at that time he told the FBI that the defendant would be accepted as a Mob member if he could sell so much, and he hadn't sold so much at the time of his arrest, on the stand Box says, "Well, I don't remember that conversation."

It's too much doubt, as far as this court is concerned, to say, based upon that, that I can find his sole testimony to be that this person is a member of the Mob. He's close to the Mob. He did a lot of things, and for that he'll be responsible for. But to say that he's responsible as a member of the Mob for other activities of the Mob, when it hasn't been shown to me that he's involved as a Mob member, I cannot do. Therefore, I'm not going to find that there is sufficient evidence that he is an actual member of the Mob.

* * *

THE COURT: Well, the court has taken time on this because of the very stiff penalties for crack cocaine, depending upon the amounts. It's a hundred times more serious to have crack cocaine than it is cocaine. So, it becomes – every ounce or every gram becomes important as to the level of seriousness in terms of the penalty.

[13] The court is going to make the following findings. First, in the 1991 period of time – and that's the time when Box for awhile was just a worker and later became a member, and he testifies that at that time the defendant was a worker with him and was a worker on a particular

shift throughout that period of time, and I recall that testimony and have reviewed it and have already made findings as it relates to quantities for other defendants, and I'm prepared to do that at this juncture.

I misplaced my notes as far as that early period. Let me take just a second to try to find it.

(Brief pause.)

THE COURT: All right. Previously I had found from that March through mid-August period that approximately 72 ounces of powder cocaine were attributable to a shift, and I believe Box's testimony that the defendant sold powder cocaine during that period of time, as well as from mid-August through September, the total amounts being that Box says, in his recollection and his general testimony, that would be about 87 ounces. 87 ounces translates into 2,436 grams of powder cocaine.

Because of the generalities of Box's testimony and because of the time in question, this being back in 1991, and because there is virtually no corroboration of it, even though I believe Box generally that Tidwell was selling, I have [14] previously discounted that to a level of 10 percent of that amount, and I'll do so here. Therefore, there would be 243.6 grams of powder cocaine that I would attribute to this defendant.

This is the most exact way I can do it. I realize that you take a percentage. I suppose it could be 15 percent. I suppose it could be 30 percent. But because of, one, the generalities of Box's testimony and, two, the distance in time – this occurred back in 1991 – I have used a 10



percent factor. I'll add that this doesn't make much difference in the overall scheme of things because it's the crack cocaine that becomes the crucial factor at a later point.

The court will further find that there is testimony by Box that in December and January of 1993, he estimates today that the defendant sold for him approximately 30 days out of those 60 days and that he was selling about 50 to $150 worth. The government has said, "We'll take the conservative figure of $50 that he would make as profit, and that would come out to be about 15 ounces." Of those amounts, Box estimates that the 75 percent would be crack and 25 percent would be powder. That's an estimate, it's a guess, and it's a serious consequence depending upon what factors I find.

I believe based upon the evidence that it's not just Box's testimony that the defendant was selling, but it's clear from my mind that the defendant was with the members of the [15] core group. As I said earlier, he was with, in February of 1993, the group when it disciplined Purvis, and there are later phone conversations where it clearly shows Tidwell was involved with members of the Mob, in whatever role he had – as a worker or whatever – that he was selling. In addition, he was apprehended by the police, for which he was convicted on count number – I believe is that six? Was it Count 6 that he was convicted of?

MR. ZUBA: Yes.

THE COURT: The small just – what was it? .17 grams. I think it was a small amount.

MR. ZUBA: It was small.

MR. BUTERA: It was –

MR. ZUBA: Point 7.

THE COURT: .70.

MR. BUTERA: Yes.

THE COURT: That further is evidence that at least the jury found possession with intent to sell, and I see no reason why that is not an accurate conclusion.

The court is going to on the conservative side state that of those 15 ounces, and because Box is approximating 30 days – it could be 28 days, it could be 32 days – because of these generalities, the court is going to assess it at approximately 15 ounces and make 50 percent of it crack cocaine and 50 percent of it powder cocaine. That would be 7.5 ounces [16] times what is it? 28?

MR. ZUBA: Yes, Judge.

THE COURT: Is it 28 point something?

MR. ZUBA: 28.2. We've been using 28.

THE COURT: All right. We'll use 28.

MR. ZUBA: 210 grams.

THE COURT: All right. 210 grams of powder and 210 grams of crack. Based on those transactions then – that did not include the additional two ounces that Box said he gave him in February, and I will attribute one ounce to crack and one ounce to powder. I believe Box's testimony in the sense that he did provide the defendant with those amounts. One ounce is, again, 28 grams; is that correct?



MR. ZUBA: Yes, Judge.

THE COURT: 28 grams of each.

And I will further find that based on Decarles McGhee's testimony – and I've reread that again. He testified that he sold the defendant one pack of rock about one time per week for $425 from January 1st 'til the date of their arrest.

I'm going to find that that would be approximately – I'm going to find that there are about 24 weeks. They were arrested on the 28th. We don't know one way or the other whether it's exactly 28 or what it comes down to, but the court is going to find that it would be approximately 24 packs. Four packs equal one ounce, and 24 packs then would be six ounces. [17] You take 28 times six, and you have 148 grams of – and that was testified to be all rock.

MR. ZUBA: That would be 168.

THE COURT: 168?

MR. ZUBA: If you started with six ounces.

THE COURT: Just a minute. Yes. I'm sorry. 168. What total do you have on crack cocaine? I come out so far with 406.

MR. BUTERA: That's what I have.

MR. ZUBA: That's what I have.

THE COURT: The court hasn't made a determination yet on the conversations on the tape. I'm going to take a brief recess. I'm going to look that over and see

whether any of that can be attributable to the defendant. We'll take about a 15-minute recess.

(Brief recess.)

THE COURT: All right. I have reviewed the transcript of the taped conversations that I had previously referred to – 130 and those other ones around that, 128, 129 – and the court can conclude from that and from the other evidence that this defendant was talking about purchasing cocaine or getting cocaine for distribution and that the amount that was going to him was three ounces.

I cannot determine that from these conversations that he was aware of the full kilo that was being distributed to [18] other persons. So, I will attribute three ounces to him, and of those three ounces, I will attribute one and a half to crack cocaine and one and a half to powder cocaine, in conformance with trial testimony that generally half that was being sold was crack and half was powder cocaine. That translates then into an additional amount of 42 grams of crack cocaine, which would total 448 grams of crack cocaine.

Is there any dispute with my arithmetic? Not with how I've arrived with it, but is there any dispute with that?

MR. ZUBA: None from the government. Did you indicate that the two ounces, one was powder and one was crack?

THE COURT: That's correct.

MR. ZUBA: No difficulty with the math. MR. BUTERA: No, Judge.



THE COURT: All right. I then would – that would be the total amount that I have found of crack cocaine, which is attributable to him by virtue of my prior findings. That's 448. As to the powder cocaine, those amounts are 243.6 grams, 210 grams, 28 grams, and 42 grams. I could spell out again where I've arrived at it from, but I think you people can gather that or not?

MR. ZUBA: The government understands.

THE COURT: Mr. Butera?

MR. BUTERA: Yes, Judge.

THE COURT: That totals 523.6 grams. The court, in [19] looking at 2D1.1, under the Guidelines for crack cocaine, he would reach a level 34, which is at least 150 grams but less than 500 grams of cocaine base. If you added in the powder cocaine, which you have to do, but you have to translate that under equivalency tables – and I have done that, and it would not increase it to another level. Do you understand that, Mr. Zuba?

MR. ZUBA: Yes, your Honor.

THE COURT: It would be – you first translate it into marijuana, and it simply would not get to another level, at least by my computation.

MR. ZUBA: I agree.

THE COURT: That puts him at a level 34. Of course, the maximum level he could reach would be 38.

• • •

THE COURT: All right. Based upon the legal standards that I've indicated to you earlier about willfulness and it must be untruthful willfulness and it also must be of a material fact, the court has assessed independently the testimony of all the witness for the purposes of the sentencing hearing. It's not the function of the jury to determine guilt or innocence on the credibility of the witnesses, but I must determine it as for the sentencing, and it must be by a preponderance of the evidence.

The court would make the following findings that in my [20] judgment show untruthful willful statements of material facts by the defendant when he testified. One would be on Page 7, denying obtaining packs of cocaine from Decarles McGhee, contrary to McGhee's testimony. I believe McGhee. McGhee had no reason to lie about this defendant. I watched McGhee while he testified, and I find that his testimony is certainly credible.

As to the next finding of perjury, I would find that the defendant claimed that the cocaine he possessed on April 30, 1993, was possessed only for personal use and not for resale. I think that that has been shown to be untrue; all the actions that were taken by the defendant to avoid arrest, the money he had on him. The tapes somewhat verify that he about this time was involved with the leaders of the conspiracy, and, as far as I'm concerned, that was untruthful.

I further find that where the defendant denied hitting Reginald Purvis in the head and being present when Purvis was hit in the head and denied driving Purvis to the hospital, I believe Purvis' testimony that he was hit in



the back of the head by the defendant. There would be no reason for Purvis to single out the defendant if he could have just as well singled out one of the actual Mob members. Box corroborates this. I think it's perjury.

The next one I would find is that the defendant claimed he was not a member of the Gangster Disciples street [21] gang. And, again, these are material because they're bits and pieces of putting together a conspiracy. They're not peripheral facts. But if the defendant was involved in disciplining somebody, that's obviously a part of the conspiracy, as was being a member of the Gangster Disciples. That would link him with the others. And I certainly saw no evidence by anyone else that that particular symbol was one that's worn by the members of the Masonic church.

As far as I'm concerned, there are photographs and Box's testimony that bear out that he was a member of the Gangster Disciples, which is linked to the conspiracy. The defendant also claimed he was not depicted in any photographs engaging in the Gangster Disciple handshake or flashing a Gangster Disciple hand sign. I think the pictures show that that is not true.

In addition, the defendant claimed he was not aware of or part of any plan or conspiracy to distribute cocaine. I think that is untruthful, according to my judgment of the testimony, and that's corroborated by Walker, Box, McGhee, and the tapes. The defendant was a part of this conspiracy.

The court further would note that the testimony regarding Exhibit 61-2 regarding triple beam, the defendant tried to get out of that conversation, which was

recorded, by reference to – saying that was a reference to clothing size. That's not truthful, and I so find.

[22] He claimed the reference in Exhibit 82 to a zone for twelve meant an ounce of marijuana for $1200, as opposed to an ounce of cocaine for $1200. I believe that's false. Cocaine was going for $1200 an ounce, not marijuana.

And I further find that where the defendant claimed that a conversation with Randy Horton in Exhibit 130 related to a quarter ounce of marijuana, as opposed to bagging up ounces of cocaine, I disagree. I think they were talking about cocaine, and Box verifies that, as well.

Based on all those findings – and I could probably make it to other evidence in the record – I am finding that the defendant's statements at trial under oath were untruthful, willfully so, were material, and is an obstruction of justice under 3C1.1, and I will enhance his sentencing level by two, which now puts it at a 36.

The court has – I think there's only one – well, there's two remaining. The next would be the role in the offense under – I believe that's – is it 2B or is it 2 –

MR. BUTERA: 3B1.1.

THE COURT: 3B1.1

MR. BUTERA: (a) and (b).

THE COURT: 3B1.1, is it?

MR. BUTERA: 3B1.1(a) and (b).

THE COURT: The court is prepared to address that with this statement. Others who have been – I've



found are members [23] of the Mob have been given a four-point enhancement level. I have not found that this defendant is a member.

Is there any other basis, Mr. Zuba, that you can argue? I realize you argue that he is a member, but is there any other basis that you can argue that his role in the offense would be such that any points would be enhanced under that?

MR. ZUBA: My argument would be based on Donald Box's testimony. And I accept your finding that he wasn't a member of the Mob, wasn't officially back in. The only thing that I can ask you to consider is the testimony of Box that he was at meetings. He shared in the split. He had an equal say.

The end conclusion is he wasn't a Mob member, based upon your finding, but what I say to the court is, first of all, there's no reason for Box to lie about those activities. If he was lying about Joe Tidwell, he wouldn't have taken him out in '92. He could have put him in in early '93 when he's at this meeting when he clubs Purvis, which is January of '93. Purvis has no reason to put him in the Mob because when Box puts him in, Purvis is already out.

So, the only thing I can cite is to find Box's testimony truthful with respect to what Joe Tidwell did, and that is that he was present at meetings, he had an equal say, he shared in the profits, and based upon that one July 10 testimony, he obviously assisted in the cut of the kilo.

THE COURT: Well, the court, to shortcut things – do [24] you want to argue?

MR. BUTERA: No, that's fine.

THE COURT: The court has previously indicated that as to Donald Box's testimony as to membership in the Mob, it's not corroborated. Therefore, he can't be given a leadership role for that. In terms of Box's testimony, well, he had splits and the like, that's not corroborated in any way, and that is the same as his testimony that this person for a short period of time was a part of the Mob, and it simply doesn't have the corroboration that's necessary, and it is inconsistent with Box's testimony at least at one point prior to trial.

The court would again reiterate, as far as I'm concerned, the defendant was very active throughout at various points in the conspiracy. In the early part; then not involved in '92, except at a late point; and then involved in various ways in 1993. But there's no indication that he was an organizer. He certainly was not that. And as a leader, I do not find that. Did he supervise other persons as a manager? There's no evidence of that.

Therefore, while he's active, as many other people were in this conspiracy, he's not entitled to any additional points for his role in an aggravating sense, and even though you haven't made the motion, he's not entitled to any mitigating role as a minor participant. He was a major participant in this particular – an active participant as a [25] seller, and, as a consequence, he is treated as such; although, he doesn't get enhanced points for being an organizer or leader or manager.

* * *



THE COURT: All right. The court, of course, has looked at 2K2.4 and Application Note 2, where it specifically says, "Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm is not to be applied in respect to the Guideline for the underlying offense."

And the court has imposed – or will impose a sentence for his conviction of count – I believe it's six, the possession of a weapon during the course of a felony, and will impose a five-year mandatory consecutive sentence for that. As a consequence, it's my interpretation of this section that where it says, "Where a sentence for the underlying offense -Any specific offense characteristic for the possession, use, or discharge of a firearm is not to be applied in respect to the Guidelines for the underlying offense."

It's clear, as far as I'm concerned – there's one court that disagrees from a different circuit – and I simply believe that that is the clear language of the application notes, and for that reason I agree with the probation officer in not applying an enhancement.

[26] Under the next basis for an enhancement there, which is 5K2.0, isn't it?

MR. ZUBA: Yes, it is, Judge.

THE COURT: The court has considered its discretion under that Guideline. It does have discretion if it falls within the basis for a departure. I exercise my discretion and find that there is a penalty that's prescribed for

the possession of a weapon. That will be the penalty, as far as that is concerned.

I have great latitude in my sentencing under Count 1 and Count 5 within the Sentencing Guideline range that will be established at a 36 level and a criminal history of two, and I will certainly take that into account, the fact that he possessed multiple weapons, but it will not be the basis for an increased enhancement.

So, therefore, I will deny the 5K2.0 request for an enhancement or objection by the government to the probation officer's not giving it that enhancement. Are there any other matters that relate to my calculations of the Sentencing Guidelines at this time? Mr. Zuba?

MR. ZUBA: No, your Honor.

THE COURT: Mr. Butera?

MR. BUTERA: No, Judge. Excuse me. (Brief pause.)

MR. BUTERA: The only other matter, Judge, in light [27] of – and it's hard to anticipate what the court's findings are going to be, and they were not argued in my objections because of what I thought was going to be the scenario of everything, but there is what the court can consider for a mitigating role in terms of Mr. Tidwell, if he was a minor participant, where there can be a two-level decrease, and I would ask the court to consider that. I don't have the section off the top of my head, but I know that there's a –

THE COURT: Well, it's right next to 3B or –

MR. BOCKOVER: It's 3B1.1, your Honor.



THE COURT: It's probably 3B1.2.

MR. BOCKOVER: That's correct.

THE COURT: Yes, it is. Counsel, I will allow you to make an oral motion, and I will allow you to proceed. I've already indicated that I'd be disinclined to grant that motion.

MR. BUTERA: Okay.

THE COURT: But I'll allow you to make it.

MR. BUTERA: I would just reiterate to the court that I believe that a mitigating role could be – that there could be a basis for it, either minimal participant or minor participant, minimal participant being a four-level decrease, minor participant being a two-level decrease or, if someone falls in the middle of that, a three-level decrease.

I would look to the testimony that was presented. Although Mr. Tidwell may have had an active role in the [28] conspiracy, he played a minimal part or a minor part in the conspiracy in the fact that, basically, he was a worker throughout.

I could anticipate an argument by the government saying, well, he's at meetings, he's carrying out punishment. Well, part of minor participants involved in the conspiracy are workers. They're at the low end. Security people, muscle men, enforcers, whatever you want to call them, that are on the low level of what is going on. And I think in the whole scheme of things, as to everything that was happening, that he would qualify for a mitigating role, and I would ask the court to at least do a two-level

decrease, if not a minimum role participant at a four-level decrease. Thank you, your Honor.

THE COURT: The court doesn't need argument from the government. As far as I'm concerned, he is neither a minimal participant or a minor participant under the whole scheme of things. I will find under the evidence that he was a seller on the street level for long periods of time at different intervals. He was with the leaders and was close to the leaders during the latter stages of the conspiracy, and he knew what was going on, and he participated in any way that he could, and it's simply he was slightly under them, but was more involved than the ordinary seller on the street. Even the seller on the street was not a minor participant under the ones that I've heard that are involved in this indictment. Several [29] were runners who also sold at one point in time. This defendant is not entitled to any decrease. Anything else, counsel?

(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

Mary T. Lindbloom



**United States Court of Appeals,**
**Seventh Circuit.**

**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**Vincent EDWARDS, Reynolds A. Wintersmith,**
**Horace Joiner, Karl V. Fort, and**
**Joseph Tidwell, Defendants-Appellants.**

**Nos. 94-3805, 94-3833, 94-3952, 94-3953, 95-1358.**

Argued Dec. 2, 1996.

Decided Jan. 30, 1997.

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Before CUMMINGS, EASTERBROOK, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge.

An indictment charged that 20 persons, affiliated with the Gangster Disciples street gang, distributed cocaine in and near Rockford, Illinois. The leaders of this ring called themselves "The Mob". Five pleaded guilty; the remaining 15 were tried in three groups. Other panels of this court have affirmed the convictions and sentences resulting from two of these trials. *United States v. Evans*, 92 F.3d 540 (7th Cir.1996); *United States v. Russell*, Nos. 94-4000 *et al.*, 1996 WL 508598 (7th Cir. Aug. 30, 1996) (unpublished order). After their convictions in the remaining trial, Karl V. Fort and Reynolds Wintersmith were sentenced to life in prison, Joseph Tidwell to 312 months, Horace Joiner to 126 months, and Vincent Edwards to 120 months. Arguments that are variations on contentions made to the panels in *Evans* and *Russell* we

reject without additional verbiage. Many others we bypass because they do not affect the sentences. Precise calculations of drug quantity do not matter when the amounts are as large as they are here. Only one contention requires discussion: defendants' joint argument that the judge must sentence them as if all of the cocaine were cocaine hydrochloride (powder), because the jury's verdict does not unambiguously establish that they peddled any cocaine base (crack).

Count I of the indictment charged the defendants with conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The instructions told the jury that it could convict the defendants under Count I if it concluded that the conspiracy "involved measurable amounts of cocaine or cocaine base." The jury returned a verdict of guilty – which means, appellants insist, that the verdict does not establish that they distributed any crack, for the jury would have returned the same verdict had all of the drug been powder cocaine. Because, on this understanding, "there is simply no way of determining from the general verdict which of the conspiratorial objectives the jury found beyond a reasonable doubt" (Appellants' Joint Br. 33), appellants ask us to require the prosecutor to elect between a new trial and resentencing on the assumption that all of the cocaine was powder. Defendants did not object to this part of the instructions or the verdict form, and they did not ask the court to elicit from the jury the information they now say is missing, so they argue now that the district court committed plain error. See *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).



Five courts of appeals have held that, when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendants must be sentenced as if the organization distributed only the drug carrying the lower penalty. *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.1984); *Newman v. United States*, 817 F.2d 635 (10th Cir.1987); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir.1990); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir.1993); *United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir.1994). *Newman* held that the shortcoming it identified is "plain error." 817 F.2d at 637 n. 3; see also *United States v. Pace*, 981 F.2d 1123, 1128 (10th Cir.1992). We believe that all of these decisions are wrong. There was no error, and hence no plain error, in this case.

Our reason is simple: under the Sentencing Guidelines, the judge alone determines which drug was distributed, and in what quantity. *Witte v. United States*, ___ U.S. ___, ___-___, 115 S.Ct. 2199, 2207-08, 132 L.Ed.2d 351 (1995); *United States v. Cooper*, 39 F.3d 167, 172 (7th Cir.1994); *United States v. Levy*, 955 F.2d 1098, 1106 (7th Cir.1992); U.S.S.G. § 1B1.2(d) & Application Note 5. The "relevant conduct" rule requires the judge to consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment. U.S.S.G. § 1B1.3; *United States v. Watts*, ___ U.S. ___, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. White*, 888 F.2d 490 (7th Cir.1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 8-12, 25-28 (1988). A judge therefore may base a sentence on kinds and quantities of drugs that were not considered by the jury.

*United States v. Garcia*, 69 F.3d 810, 818-19 (7th Cir.1995); *United States v. Montgomery*, 14 F.3d 1189, 1196-98 (7th Cir.1994); *United States v. Villarreal*, 977 F.2d 1077, 1080 (7th Cir.1992). Because sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal. *Watts, supra*. What a jury believes about which drug the conspirators distributed therefore is not conclusive – and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options.

*Orozco-Prada*, first in the line of contrary decisions, relied on a series of cases that address a different problem. Suppose the indictment charges that the defendants conspired to commit two crimes – say, bank robbery and money laundering – that have different maximum punishments. Because the punishment for conspiracy depends on the punishment for the substantive offense, 18 U.S.C. § 371; 21 U.S.C. § 846, a disjunctive verdict form (or a disjunctively phrased indictment) leaves unresolved the question whether the conspirators pursued both objectives and, if only one, which. The judge does not have authority to sentence the defendants to 20 years (the bank robbery maximum) if they conspired only to launder the proceeds of someone else's robbery. So unless the prosecutor consents to a sentence based on the lower maximum punishment, there must be a new trial. See *Brown v. United States*, 299 F.2d 438 (D.C.Cir.1962) (Burger, J.), among the several similar cases cited by *Orozco-Prada*, 732 F.2d at 1083-84. *Brown* and its successors reach an entirely sensible result but have nothing to do with an



indictment that charges the defendants with agreeing to commit *one crime* in *two ways*. Powder and crack cocaine are variations of the same drug sold to distinct segments of the retail market; the difference has consequences for sentencing under 21 U.S.C. § 841(b) and the Guidelines, but not for the identification of the substantive offense. Cf. *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *Neal v. United States*, ___ U.S. ___, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Section 841(a)(1) makes it unlawful "to manufacture, distribute, or dispense, or to possess with intent to manufacture, distribute or dispense, a controlled substance". That is the crime these five defendants conspired to commit. Application of the disparate sentencing rules for different types and quantities of controlled substances is for the judge rather than the jury. This is why it is unnecessary for the indictment to charge how much of a drug was involved, even though quantity matters greatly to the sentence. An indictment could charge the defendants with "conspiring to distribute controlled substances in violation of 21 U.S.C. § 841(a)" without identifying either the substances or the quantities. Defendants might well prefer this form of charge, if the alternative is multiple conspiracies for multiple drugs, with cumulative punishments. Cf. *United States v. Duff*, 76 F.3d 122 (7th Cir.1996). If the grand jury specifies details, the proof and the jury charge may not depart from them in a way that constructively amends the indictment. Compare *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), with *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). See also *United States v. Leichtnam*, 948 F.2d 370, 378-81

(7th Cir.1991). But the indictment here identified both powder and crack; defendants do not argue variance.

*Orozco-Prada* did not mention the difference between conspiracy to commit two crimes, and conspiracy to commit one crime in two ways. It therefore applied the *Brown* principle uncritically. *Newman* relied on both *Brown* and *Orozco-Prada*, again without making the distinction. Neither *Orozco-Prada* nor *Newman* mentioned the difference between the jury's and the judge's roles. *Newman* even concluded that "the uncertainty taints the conviction itself" (817 F.2d at 639) and remanded for a new trial – a position since disapproved by *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), and inconsistent with our conclusion in *United States v. Peters*, 617 F.2d 503 (7th Cir.1980), which the tenth circuit declined to follow, 817 F.2d at 638. Finally, *Owens*, *Bounds*, and *Garcia* relied on *Orozco-Prada* and *Newman* without independent analysis.

In *United States v. Banks*, 78 F.3d 1190, 1201-04 (7th Cir.1996), we held (following *Peters*) that there is no problem when the instructions are phrased in the conjunctive, for then the jury necessarily finds that the defendants distributed all of the drugs identified in the indictment. Now we add that there is no problem when the instructions are phrased in the disjunctive, because (subject to the variance possibility discussed above) as long as the jury finds that the defendants conspired to distribute *any* drug proscribed by § 841(a)(1), the judge possesses the power to determine which drug, and how much. Our conclusion has the support of holdings in the eleventh circuit, see *United States v. Williams*, 876 F.2d 1521, 1525 (11th Cir.1989); *United States v. Dennis*, 786 F.2d 1029,



1038-41 (11th Cir.1986), although not of all the language in these opinions. *Dennis* expressed a preference for obtaining a special verdict from the jury – and even so was disapproved by *Newman* for holding that the judge could make an independent decision about the type and quantity of drugs involved – but we see no reason to put an extra question to the jurors, whose tasks are complex enough when trying to address the questions that the law commits to them. *Williams* could perhaps be distinguished on the ground that it involved a request for a lesser-included-offense instruction, but its holding – that the defendant is not entitled to this instruction, because distributing powder cocaine cannot be a lesser included offense of distributing cocaine base when the two are the *same* offense – establishes the same principle on which we rely. Whether the conspiracy deals different drugs or different forms of the same drug is not pertinent. A charge that the conspirators agreed to distribute marijuana, cocaine, and heroin identifies only a single crime – for the conspiracy is the *agreement* and not the distribution, see *United States v. Shabani*, 513 U.S. 10, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994) – and the judge is free to determine after the verdict which penalty is appropriate in light of the types and quantities of drugs handled. A conflict among the circuits was apparent after the tenth circuit's disapproval, in *Newman*, of decisions from the seventh (*Peters*) and eleventh (*Dennis*), and may well have been implicit in our decisions about the allocation of authority between judge and jury. But because our decision makes the scope of the conflict so clear, we have circulated this opinion to all active judges under Circuit Rule 40(e). A majority did not favor a hearing en banc.

Circuit Judge Ripple voted in favor of hearing this case en banc.

AFFIRMED.

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**SUPREME COURT OF THE UNITED STATES**

No. 96-8732

Vincent Edwards, Reynolds A. Wintersmith, Horace Joiner, Karl V. Fort, and Joseph Tidwell,

Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

October 20, 1997

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(5)



No. 96-8732

In The

# Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH, HORACE JOINER & JOSEPH TIDWELL,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Under 21 U.S.C. §§ 841(b) and 846, conspiracy to distribute "cocaine base" is punished more harshly than conspiracy to distribute "cocaine." When a defendant has been convicted of a single conspiracy to distribute the two substances based on a general jury verdict which does not disclose the object of the conspiracy of which the jury found the defendant guilty, must he be sentenced on the basis of the criminal object carrying the lesser penalty or be provided a new trial?

## PARTIES TO THE PROCEEDING

Petitioners, Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell, were the appellants below. Respondent, the United States of America, was the appellee below.



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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled *United States v. Edwards*, is reported at 105 F.3d 1179 (7th Cir. 1997), and is included in the Joint Appendix at section A-5. (J.A. 179-86).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On January 30, 1997, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of the District Court in the case of *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997). A Petition for Certiorari on behalf of all Petitioners was filed on April 21, 1997. This Court granted certiorari on October 20, 1997. (J.A. 187).

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are set forth in full in Appendix A to this brief: the Fifth and Sixth Amendments of the Constitution of the United States; 21 U.S.C. § 846; and 21 U.S.C. § 841.

## STATEMENT OF THE CASE

### A. The Indictment

The indictment in this case (No. 93 CR 20024) was returned by the Grand Jury sitting in the United States District Court for the Northern District of Illinois, Western Division, on July 27, 1993. (R. at 1).[1] A superseding indictment was filed on November 23, 1993, extending the time period referred to in Count One by one day and adding 11 additional counts. (R. at 357). The superseding

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[1] Citation to the record below is noted by the abbreviation "(R. at ___)" followed by the docket entry of the item referenced.

indictment named 20 defendants in 26 counts charging these individuals with various narcotics and firearms offenses in violation of 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. §§ 924(c) and 922(g). (R. at 357; J.A. 4-12).

Count One of the superseding indictment charged all five Petitioners, as well as 15 others, with conspiracy to possess with intent to distribute, and conspiracy to distribute, cocaine and cocaine base from a period beginning in 1989 and continuing until July 28, 1993. (J.A. 4-10). The indictment alleged that the Petitioners had agreed with the other named defendants and others unknown, to participate in the street sale of quantities of cocaine and cocaine base in the Rockford, Illinois area through the operation of several drug houses.[2]

Count Four alleged that on or about April 22, 1993, Petitioners Vincent Edwards and Reynolds Wintersmith possessed with the intent to distribute approximately 5.32 grams of mixtures containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (J.A. 11). Count Five alleged that on or about April 30, 1993, Petitioner Joseph Tidwell possessed with the intent to distribute approximately 0.7 grams of a mixture containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (J.A. 12). Finally, Count Six alleged that on or about April 30, 1993, Petitioner Joseph Tidwell used and carried a firearm during and in relation to a drug trafficking crime, namely, the offenses described in Counts One and Five of the indictment, in violation of 18 U.S.C. § 924(c).[3] (J.A. 12).

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[2] Count Two alleged that on or about January 15, 1993, Petitioner Karl Vincent Fort knowingly and intentionally distributed approximately 0.30 grams of a mixture containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (J.A. 11). On June 27, 1994, the Court dismissed this count with prejudice. (R. at 956, 958).

[3] The remaining counts of the superseding indictment (Counts 3 and 7-26) charged offenses only against parties who are not involved in this appeal.



**B. The Trial and Verdict**

Several defendants charged in the indictment entered guilty pleas prior to trial. (R. at 436, 449, 495, 654). After initially denying various severance motions, the court granted the defendants' motion for severance and divided them into three groups for trial. (R. at 711, 712). The five Petitioners were tried together in the second of the three trials. The trial in this matter commenced on June 27, 1994, in the U.S. District Court for the Northern District of Illinois, Western Division, before the Honorable Philip G. Reinhard. (R. at 958).

Various government witnesses testified at trial that Petitioners played differing roles in a *retail* drug operation in Rockford, Illinois. (*See, e.g.*, Tr. at 912-13, 982-87).[4] Government witnesses testified that the retail operation consisted of a number of drug houses at which individual dosages of powder cocaine were sold to customers who came to the houses. (Tr. at 838). These drugs were packaged at the houses and sold in small "dime bags," or $10 bags. (Tr. at 839-40). Some cooperating witnesses testified that the drug houses later also began to sell cocaine base, or "crack," which certain members of the conspiracy manufactured. Apart from the testimony of these witnesses, the government introduced evidence obtained during searches conducted in July 1993, toward the end of the alleged conspiracy. (*See, e.g.*, Tr. at 1646-67, 2089-2159, 2179-2231, 2302-25). Law enforcement officers also seized small quantities of drugs. (*See, e.g.*, Tr. at 484-546, 616-43, 698-717, 2020-32). In addition, an undercover purchase of powder cocaine from one of the drug houses occurred. (Tr. at 742, 1698-1718).

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[4] The transcript of the trial proceedings is numbered sequentially from jury selection to the return of the verdict. It is cited throughout this brief as "(Tr. at ___)" followed by the page number of the transcript at which the cited assertion appears.

No special verdicts with respect to the different objects of the conspiracy were requested. On July 18, 1994, the jury found all Petitioners guilty of Count One of the indictment, Petitioners Edwards and Wintersmith guilty of Count Four of the indictment, and Petitioner Joseph Tidwell guilty of Counts Five and Six of the indictment. (J.A. 18-23).

### C. The Sentencing

On November 21, 1994, Judge Reinhard held a sentencing hearing for Petitioner Karl Vincent Fort. The court held Fort liable for 24 kilograms of cocaine and held that half of that amount was powder cocaine, half was cocaine base. (J.A. 64-86). That quantity of drugs resulted in a base offense level of 38. *See* U.S. Sentencing Guidelines Manual § 2D1.1(c). With the two-level and four-level enhancements for use of weapon and his role in the offense respectively, *id.* § 2D1.1(b)(1) and § 3B1.2, the court set Fort's offense level at 44, resulting in a mandatory life sentence under the Sentencing Guidelines.

On November 23, 1994, Judge Reinhard held a sentencing hearing for Petitioner Reynolds Wintersmith. On Count One, the court held that the core group of which Wintersmith was a member was liable for 8 kilograms of cocaine. The court allocated 50 percent of this amount to powder, the remainder to cocaine base. With regard to Count Four, the court found that Wintersmith possessed 5.32 grams of cocaine base. The court thus set the base offense level at 38. (J.A. 97-113). Including leadership and gun possession enhancements, the court set Wintersmith's total offense level at 44. The court imposed a mandatory life sentence on Count One, along with a concurrent sentence of 40 years of incarceration on Count Four. (J.A. 96).

On November 22, 1994, Judge Reinhard held a sentencing hearing for Petitioner Horace Joiner. On Count One, the court found Joiner liable for 14 grams of cocaine base and 7 grams of powder cocaine, resulting in a base



offense level of 26. With a two-point enhancement for firearm possession, the court placed Joiner's offense level at 28; considering Joiner's criminal history, this resulted in a guideline range of 110-137 months of incarceration. The court imposed a sentence of 126 months. (J.A. 114-42).

On November 22, 1994, Judge Reinhard held a sentencing hearing for Petitioner Vincent Edwards. The court found Edwards liable for 201 grams of powder cocaine and 5.32 grams of cocaine base with respect to Count One and 5.32 grams of cocaine base with respect to Count Four, resulting in a base offense level according to the Sentencing Guidelines of 26. With a two-level enhancement for firearm possession, the court assigned to Edwards a total offense level of 29. In light of his criminal history, this offense level placed Edwards in the Guidelines range of 97 to 121 months. (J.A. 26-36). The court imposed a sentence of 120 months of incarceration.

On January 18, 1995, Judge Reinhard held a sentencing hearing for Petitioner Joseph Tidwell. On Count One, the court found Tidwell liable for 448 grams of cocaine base and 971.6 grams of cocaine powder. On Count Five, the court found that Tidwell distributed 0.7 grams of cocaine base. The court thus found a base offense level of 34. With a two-point enhancement for obstruction of justice, the court placed Tidwell's offense level at 36. In light of Tidwell's criminal history, a guideline range of 210-262 months resulted. The court imposed a sentence of 252 months, plus a five-year consecutive sentence on Count Six. (J.A. 143-52). For all Petitioners, the attribution of cocaine base as the drug agreed to be distributed in Count One was determinative in substantially raising the offense level, and thus greatly increasing the length of the sentence.

### D. Appeal to the United States Court of Appeals for the Seventh Circuit

The Petitioners appealed their convictions and sentences to the United States Court of Appeals for the Seventh Circuit. The Petitioners argued that their sentences were improperly imposed because the indictment presented a multi-object conspiracy and the general verdict of guilty did not disclose the object that the jury found each of the Petitioners to have agreed to commit. Relying on the rule developed in eight different courts of appeals confronted with similarly ambiguous verdicts, *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), *appeal after remand*, 70 F.3d 679 (1995), *cert. denied sub nom. Joyce v. United States*, ___ U.S. ___, 116 S. Ct. 1556 (1996); *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 342 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Bounds*, 985 F.2d 188, 193 (5th Cir.), *rehearing denied*, 990 F.2d 628, *cert. denied*, 510 U.S. 845 (1993); *United States v. Owens*, 904 F.2d 411, 414 (8th Cir. 1990); *United States v. Garcia*, 37 F.3d 1359, 1369-70 (9th Cir. 1994), *cert. denied*, 514 U.S. 1067 (1995); *Brown v. United States*, 299 F.2d 438, 440 (D.C. Cir.), *cert. denied sub nom. Thornton v. United States*, 370 U.S. 946 (1962), the Petitioners asked that their convictions be set aside and that they be granted a new trial or that their sentences be based on the object carrying the lesser punishment.

The Seventh Circuit rejected Petitioners' argument. *Edwards*, 105 F.3d at 1180-81. The Seventh Circuit held that under the Sentencing Guidelines, the judge determines the type and quantity of controlled substances involved in an offense and may consider relevant conduct to include drugs not charged or considered by the jury and that the jury's findings "about which drug the conspirators distributed therefore is not conclusive." *Id.* at 1181. The Seventh Circuit also held that the indictment presented to the jury charged the Petitioners with committing a single crime in two ways and "as long as the



jury finds that the defendants conspired to distribute *any* drug proscribed by § 841(a)(1), the judge possesses the power to determine which drug, and how much." *Id.* at 1182 (emphasis in original). Thus, the Seventh Circuit disagreed with the majority of courts of appeals, and affirmed the Petitioners' convictions and sentences.

## SUMMARY OF ARGUMENT

The general verdicts in this multi-object conspiracy case are fundamentally ambiguous because they fail to specify the statutory object of the conspiracy under 21 U.S.C. § 846 ("Section 846"). It is impossible to tell, therefore, whether the jury found the Petitioners each guilty of conspiracy to distribute powder cocaine only, cocaine base only, or both powder cocaine and cocaine base – or whether the jury simply never addressed the question of which object each juror found each Petitioner to have conspired to achieve. Even though the jury verdict did not establish that Petitioners were found guilty of conspiring to distribute cocaine base, the District Court sentenced Petitioners on the assumption that the offense of conviction on Count One was conspiracy to distribute both cocaine powder and cocaine base. The Seventh Circuit held that this sentencing procedure is permissible because it found that a Section 846 conspiracy to distribute drugs constitutes a single conspiracy to violate a *single object offense* – namely, 21 U.S.C. § 841(a) ("Section 841(a)") – regardless of the number and variety of drugs involved or the vastly different statutory maximum penalties for each. That decision is in error.

The correct construction of Section 846 demonstrates that, in the case of a conspiracy to violate Section 841(a), the offense of conviction must be defined to include the identity of the drug involved. The sentencing court, therefore, may not assume the offense of conviction is conspiracy to distribute cocaine base unless the jury's verdict specifies the offense of conviction specifically to include cocaine base. Where, as in this case, the verdict

does not specify the drug, the District Court may not base sentencing on the most severe interpretation of the verdict, carrying the highest range of statutory penalties, but must either assume the penalty carrying the lowest statutory sentencing range applies or grant a new trial with a special verdict that will identify the drug or drugs which the jury finds were the object of the conspiracy.

This result is compelled by the express language, statutory structure, and history of Section 846, which demonstrate that Congress intended a jury verdict to specify the object of a Section 846 conspiracy, including the identity of the drug or drugs which was the object of the conspiracy. Recent statutory amendments to Section 846 confirm the conclusion that the type of controlled substance is encompassed in the object of a Section 846 conspiracy.

In addition, this Court's cases discussing the meaning and requirements of conspiratorial agreements, Double Jeopardy principles in narcotics cases, and the Sixth Amendment and Due Process violations which the government's construction would entail, all compel the conclusion that Congress intended the jury to determine the object of the Section 846 offense, including the type of narcotics which were the subject of the alleged agreement. Not only is the government's and Seventh Circuit's construction of Section 846 contrary to the statute's plain meaning, but it would lead to bizarre and unfair results, to unavoidable conflicts with precedents of this Court and the lower courts in related contexts, and to constitutional infirmities. In contrast, Petitioners' construction provides a coherent, consistent and just interpretation of the language and Congressional purpose of Section 846.



## ARGUMENT

### A. The Jury's Verdicts Failed to Specify the Object of the Section 846 Conspiracy

The verdicts in this case are fundamentally ambiguous because they fail to specify the statutory object of the conspiracy under Section 846. It is impossible to tell, therefore, whether the jury found the Petitioners each guilty of conspiracy to distribute powder cocaine only, cocaine base only, or both powder cocaine and cocaine base – or whether the jury ever addressed the question of which object each juror found each Petitioner to have conspired to achieve.

The indictment charged the Petitioners with conspiring "knowingly and intentionally to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code Section 841(a)(1)." (J.A. 6-7). The conspiracy count did not specify any quantity or range of quantities of cocaine or cocaine base as the sole object of the conspiracy. (J.A. 6-7). The jury was instructed that the indictment charged the Petitioners with "conspiring to possess with intent to distribute and to distribute cocaine and cocaine base," (J.A. 13), and the conspiracy count was so characterized throughout the instructions to the jury. (J.A. 15, 16). However, the jury was further instructed that the Petitioners could be found guilty of Count One if the government proved the conspiracy "involved measurable amounts of cocaine *or* cocaine base." (J.A. 16) (emphasis added).[5]

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[5] The government conceded before the Seventh Circuit that the charge to the jury presented it with a disjunctive choice of finding measurable quantities of cocaine or cocaine base and thus, the jury verdict could rest on either basis to the exclusion of the other. Government's Court of Appeals Brief at 31. The

The indictment as presented to the jury during its deliberations thus presented in a single count of the indictment a conspiracy with multiple possible objects: an agreement to distribute cocaine, an agreement to distribute cocaine base, or an agreement to do both. A conspiracy which has multiple separate objects, even if the two objects violate the same statute in the same general way, is a multiple object conspiracy. *See Griffin v. United States*, 502 U.S. 46, 57 (1991) (conspiracy to impair and impede two separate law enforcement agencies under single general conspiracy statute, 18 U.S.C. § 371, is an example of a "multiple object" conspiracy); *see also United States v. Bush*, 70 F.3d 557, 562 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 795 (1996); *United States v. Pace*, 981 F.2d 1123, 1128-30 (10th Cir. 1992) (conspiracy to distribute amphetamines and methamphetamines was a multiple object conspiracy), *cert. denied sub nom. Leonard v. United States*, 507 U.S. 966 (1993). The government could have sought in this case, and the grand jury could have returned, an indictment charging the conspiracy to distribute cocaine and the conspiracy to distribute cocaine base in separate counts charging separate offenses. *Cf. Albernaz v. United States*, 450 U.S. 333 (1981) (conspiracy to import marijuana and conspiracy to distribute same marijuana are separate offenses); *see also United States v. Richardson*, 86 F.3d 1537, 1551 (10th Cir.) ("simultaneous possession of different controlled substances may qualify as separate offenses") (citing decisions in five circuit

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Seventh Circuit's ruling acknowledged the government's concession and encompassed within its holding the disjunctive nature of the conspiracy charge. *United States v. Edwards*, 105 F.3d 1179, 1182 (7th Cir. 1997) ("In [a previous decision], we held [ ] that there is no problem when the instructions are phrased in the conjunctive, for then the jury necessarily finds that the defendants distributed all of the drugs identified in the indictment. Now we add that there is no problem when the instructions are phrased in the disjunctive . . . ").



courts of appeals), *cert. denied*, ___ U.S. ___, 117 S. Ct. 588 (1996). Instead, the prosecutor presented to the grand jury, and the grand jury voted probable cause on, an indictment setting forth both alleged objects in a single count.

The verdict forms presented to the jury requested general verdicts and simply asked whether the jury found each of the defendants "guilty of the drug conspiracy charge contained in Count One of the indictment." (J.A. 18-23). No special interrogatory or special verdict form was provided to the jury during deliberations seeking this information. Thus, based on the general verdict of guilty to the charge in Count One, no basis exists for determining precisely what the offense of conviction was: a conspiracy to distribute cocaine, a conspiracy to distribute cocaine base, or both.

### B. Congress Intended that the Jury Determine the Object of a Section 846 Conspiracy

#### 1. The Plain Language and Structure of the Statute

The plain language and structure of Section 846 indicate that Congress intended and assumed the jury would determine the type of narcotics in a Section 846 conspiracy. Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

This language provides that the definition of the Section 846 conspiracy in each case is tied to potential penalties for the substantive offense, the commission of which was the object of the conspiracy. The term "offense" is used to identify a particular offense for which specific penalties are "prescribed" by statute. Thus, Section 846 expressly identifies "the *object*" of the attempt or conspiracy

charged as the underlying "offense."[6] In the case of conspiracies to distribute drugs, for example, Section 841 sets out different penalties for the different possible *objects* of such a conspiracy, and these different objects depend on the identity of the narcotics in question. A Section 846 conspiracy, therefore, is in each case defined by "the offense" (a) for which penalties are "prescribed" by statute and (b) "the commission of which was the object of the attempt or conspiracy." The "object of the attempt or conspiracy" refers to and expressly incorporates the entirety of any provision setting forth an "offense defined in this subchapter," including its description, its penalty, and its special enhancements.

Thus, for example, a conspiracy to use the telephone to distribute narcotics, 21 U.S.C. § 843(b) ("Section 843(b)"), subjects a defendant to a maximum penalty of four years imprisonment, because Section 843(b) sets forth, in a single paragraph, a description of an offense and only a single maximum penalty of four years. 21 U.S.C. § 843(b). In contrast to Section 843(b), distribution of narcotics under 21 U.S.C. § 841(a) ("Section 841(a)") does *not* define a single range or maximum penalty, as the penalties vary widely depending on, among other things, the identity of the narcotics involved. Congress provided no penalty provision for a generic violation of Section 841(a), but only for specific kinds of violations of Section 841(a). Under Section 841(a), only violations involving specified narcotics prescribe penalties. For this reason, a

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[6] Grammatically speaking, the clause "the commission of which was the object of the conspiracy" modifies the term "offense" that immediately precedes it in the statute. The term "offense" is used twice in the single sentence of Section 846, and "offense" must have the same meaning in both instances. In Section 846, therefore, the term "offense" must refer to the specific "object" for which the specific "penalties" are "prescribed" in the statute the defendant has conspired to violate.



Section 846 conspiracy premised on a Section 841(a) distribution must incorporate the particular subdivision of Section 841(b) setting forth the penalty and any of its statutory maximum enhancements. Only in that way can Congress' explicit directive that the penalty of a conspiracy or attempt "to commit any *offense*" be subject to "the same penalties as those prescribed *for the offense*" be carried out. Section 846's use of the term "offense" must include the identification of the controlled substance in question because Section 846 uses the term "offense" to identify an act for which specific penalties are prescribed, either in Section 841(a) or in another section of the Control and Enforcement subchapter, or in a specific subsection of such other section of the subchapter.

The structure of other provisions of Title 21 confirm that a Section 846 conspiracy to distribute must be read to include identification of the narcotics involved. The potential offenses for Section 846 include, for example, the crimes defined in Section 843. As with Section 841(a), Section 843(a) is labelled "Unlawful Acts" but, despite its misleading title, sets forth only one of several distinct crimes encompassed by Section 843. Section 843(a) governs only a person "who is a registrant to distribute controlled substances," while 843(b) defines a separate offense prohibiting all persons from using a communications facility to commit any crime within Title 21. Like Section 841, many other provisions within the reach of Section 846 set forth the definitions and requirements for distinct criminal offenses with different maximum penalties in different *sub*sections. *E.g.*, 21 U.S.C. § 843(b); 21 U.S.C. § 841(b)(1), (2) & (3); 21 U.S.C. § 841(b)(7)(A). Several of these subsections carry mandatory minimum sentences as well. *E.g.*, 21 U.S.C. § 841(b)(1)(A) & (B). Moreover, all of these offenses require a reference to Section 812, which sets forth the criteria and identification of the five schedules of controlled substances which

are regulated under the Drug Abuse Prevention and Control Act. 21 U.S.C. § 812(a). The Seventh Circuit erroneously assumes that Section 846 conspiracies to distribute narcotics are fully defined by Section 841(a) and require no reference to the particular drugs involved. To commit a Section 846 offense, two or more individuals must agree to commit some offense in the subchapter which has a prescribed penalty.[7]

The plain meaning of Section 846 is confirmed by examining the language of the general conspiracy statute, because the general conspiracy statute also uses the term "the offense, the commission of which is the object of the conspiracy" to include a sufficient definition of the offense sufficient to determine which of the two statutory maximums apply. 18 U.S.C. § 371. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, ___, 114 S. Ct. 655, 660 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). In Section 371, Congress distinguished between conspiracies which have as their object an offense which is a felony and conspiracies which have as their object an offense which is a misdemeanor: If the offense is a felony, the maximum sentence is five years. "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371. In Section 371 cases, when an object offense could be a felony or a misdemeanor depending on a particular threshold fact, the Courts of Appeal have long required

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[7] The elements of the offense of Section 846 include an agreement to commit a criminal object or purpose and membership in that agreement; the statute does not require an overt act. *United States v. Shabani*, 513 U.S. 10, 16 (1994). This Court has expressly held that the act of agreeing to the commission of a particular offense itself provides the "actus reus" of the crime of narcotics conspiracy. *Id.*



that particular fact to be treated as an element of the offense which the *jury* must determine. *See, e.g., United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987). The same construction should apply to Section 846: as in Section 371, the definition of the offense "the commission of which is the object of the conspiracy" must include sufficient facts, such as the identity of the narcotics, to determine the range of statutory penalties applicable to the conspiracy. Because Section 371 had existed in its present form for over twenty years when Congress chose to use that same language in Section 846, it is reasonable to conclude that Congress intended the jury to play the same role in Section 846 cases that it plays in Section 371 cases in deciding the threshold facts which determined the nature of the criminal agreement and the range of penalties Congress provided for that agreement.

This understanding of Section 846 also explains why Congress deemed it necessary for the government to give defendants notice of a prior drug conviction via a separate information, before relying on such a conviction to enhance a defendant's sentence, but did not require such a special procedure for other sentencing-determining factors, such as the type of drugs. 21 U.S.C. § 851(a) ("No person convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon."); *see also United States v. Steen*, 55 F.3d 1022, 1025-28 (5th Cir.) (holding that because "repeat offenders face significantly harsher sentences than do first offenders, Congress intended that defendants receive notice of the prior convictions on which the court is relying.") (citations omitted), *rehearing and suggestion for rehearing en banc denied by* 66 F.3d 324 (5th Cir. 1995), and, *cert. denied*, ___ U.S. ___, 116 S. Ct. 577 (1995). Congress assumed, as remains the prevailing practice, that the indictment identifying the substantive

offense which was the object of the conspiracy would also identify the type of narcotics at issue in the conspiracy charge.[8] Therefore, Congress understood Section 846 to incorporate the object offense with sufficient specificity to

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[8] For cases in this Court under Section 841 and its predecessors in which the terms of the indictment were discussed or quoted, and in which the indictment named the drug in question, *see, e.g., United States v. Ursury*, ___ U.S. ___, 116 S. Ct. 2135 (1996) (Marijuana); *United States v. Mezzanatto*, 513 U.S. 196 (1995) (Methamphetamine); *Custis v. United States*, 511 U.S. 485 (1994) (Cocaine); *Smith v. United States*, 508 U.S. 223 (1993) (Cocaine); *United States v. Padilla*, 508 U.S. 77 (1993) (Cocaine); *Kinder v. United States*, 504 U.S. 946, White, J., dissenting (1992) (Methamphetamine); *Wade v. United States*, 504 U.S. 181 (1992) (Cocaine); *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (Heroin); *United States v. Sokolow*, 490 U.S. 1 (1989) (Cocaine); *Bourjaily v. United States*, 483 U.S. 171 (1987) (Cocaine); *United States v. Johns*, 469 U.S. 478 (1985) (Marijuana); *Luce v. United States*, 469 U.S. 38 (1984) (Cocaine); *United States v. Karo*, 468 U.S. 705 (1984) (Cocaine); *United States v. Place*, 462 U.S. 696 (1983) (Cocaine); *United States v. Morrison*, 449 U.S. 361 (1981) (Heroin); *Cecil v. United States*, 444 U.S. 881, Brennan, J., dissenting (1979) (Cocaine); *United States v. Morrison*, 429 U.S. 1 (1976) (Marijuana); *United States v. Chadwick*, 433 U.S. 1 (1977) (Marijuana); *United States v. Mandujano*, 425 U.S. 564 (1976) (Heroin); *United States v. Peltier*, 422 U.S. 531 (1975) (Marijuana); *United States v. Dinitz*, 424 U.S. 600 (1976) (LSD); *United States v. Moore*, 423 U.S. 122 (1975) (Methadone); *Turner v. United States*, 396 U.S. 398 (1970) (Cocaine and Heroin named in separate counts); *Leary v. United States*, 395 U.S. 6 (1969) (Marijuana); *Sabbath v. United States*, 391 U.S. 585 (1968) (Cocaine); *Wong Sun v. United States*, 371 U.S. 471 (1963) (Heroin); *Jones v. United States*, 362 U.S. 257 (1960) (Heroin); *Harris v. United States*, 359 U.S. 19 (1959) (Heroin); *Gore v. United States*, 357 U.S. 386 (1958) (Heroin and Cocaine); *Giordenello v. United States*, 357 U.S. 480 (1958) (Heroin); *Roviaro v. United States*, 353 U.S. 53 (1957) (Heroin); *Walder v. United States*, 347 U.S. 62 (1954) (Heroin); *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916) ("Opium and salts thereof, to wit, one dram of morphine sulfate.")



identify its specific penalty provision, defendants would have constitutionally adequate notice of the maximum penalty a defendant faced from the face of the indictment itself.

### 2. Legislative History of Section 846

The recent statutory amendments to Section 846 support the Petitioners' interpretation. The immediate predecessor to this provision was also a single sentence and read as follows:

> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Congress amended this provision in 1988 and adopted the present language of Section 846 in order to accomplish two objectives: Congress' first objective was to ensure that mandatory minimum sentences for Section 841(a) violations, which were first adopted in 1986, would apply to those Section 846 conspiracies whose objectives were to distribute quantities and types of drugs which carried mandatory minimums. 134 Cong. Rec. 13,781-13,782 (1988).[9]

If the phrase "object of the offense" in Section 846 were meant only to apply to the broadest, generic description of the offense in Section 841(a)(1), then no legislative amendment would have been necessary to

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[9] Congress' second objective was to ensure that, other than the term of imprisonment, potential punishments such as special parole (now abolished), would apply equally to substantive offenses and to attempts and conspiracies which had as their objectives the commission of the substantive offense.

ensure application of the mandatory terms of imprisonment. Under the language of either the old or new version of Section 846, a defendant would be subject to the same imprisonment and fine up to the maximum penalties as provided in the substantive offense. *Bifulco v. United States*, 447 U.S. 381, 398 (1980) (relying on language of predecessor statute to conclude that Section 846 "authorizes two types of sanctions – fines and imprisonment – and fixes the maximum amount of each that may be imposed by reference to the penalty provisions of the target offense."). Likewise, given Congress' intention to have the mandatory minimums apply to Section 846 conspiracies, Congress must have intended to incorporate the type of controlled substance in its use of the phrase "object of the offense," because the minimums only apply to certain specific offenses of Section 841(a) – those involving Schedule I, II, and certain Schedule III substances – not to all Section 841 violations. A conspiracy or attempt to distribute certain Schedule III, IV or V controlled substances has no mandatory minimum sentence, and thus would not be affected by the amendment to Section 846. Congress' intent in changing the language of Section 846 was to ensure statutory penalties applied to attempts and conspiracies with objects to distribute a particular controlled substance, *i.e.*, Schedule I, II, and certain Schedule III offenses, and not *any* controlled substance. If the phrase "object of the attempt or conspiracy" meant *any* violation involving *any* controlled substance, no legislative amendment would have been necessary to accomplish that purpose.

The broader context from which Section 846 arose further confirms Petitioners' construction of the statutory language. Congress intended the Comprehensive Drug Abuse Prevention and Control Act of 1970 to combine the various earlier drug laws already in existence at that time. *See* David F. Musto, *The American Disease: Origins of Narcotic Control* 261 (1987). These earlier laws addressed particular drugs or groups of drugs, and convictions



under these laws required the identification of the drugs at issue. For example, the Harrison Narcotic Drug Act, Ch. 1, 38 Stat. 785 (1914), regulated the production and use of opium and coca leaves; the Narcotic Drugs Import and Export Act of 1922, Ch. 202, 42 Stat. 596, controlled the production and use of cocaine; the Marijuana Tax Act of 1937, Ch. 553, 50 Stat. 551, regulated the use and production of marijuana. Other statutes regulated the use and production of synthetic opiates, hallucinogens, barbiturates, and tranquilizers. *See* Kathleen F. Brickey, *The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1148-50 (1995). Thus, Congress has long recognized that different substances cause different levels of harm to society, and sought to address these different problems through discrete laws with proportionate punishments. While the 1970 Act reorganized the various laws into a more comprehensive scheme, it took this long-held recognition into account, placing drugs into different schedules corresponding to the degree of harm caused by each drug. *See Chapman v. United States*, 500 U.S. 453, 460 (1991); *Neal v. United States*, 516 U.S. 284 (1996). Subsequent amendments to the 1970 Act have continued to treat the mishandling of different drugs as different offenses. Through the 1980's, Congress enacted mandatory minimum sentences triggered by the quantity and type of drug involved. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1249 (1996). This historical trend continued with the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, which created the federal law distinction between powder cocaine and cocaine base and set mandatory minimums. Nothing in the legislative history or express provisions of the 1970 Act suggest that, in recodifying and clarifying the narcotics statutes, Congress intended to change the jury's historical role in determining the threshold facts, including the type of drugs involved, which have distinguished one drug crime, and its penalties, from another.

### 3. The Petitioners' Interpretation of Section 846 Is Consistent with General Conspiracy Principles

The Petitioners' interpretation of Section 846 is fully consistent with and supported by this Court's cases clarifying the law of conspiracy. The agreement to commit the crime that is the object of the conspiracy is the essence of a conspiracy violation. *Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."). The conspiracy statute punishes the mere agreement to commit the object offense. *Salinas v. United States*, No. 96-738, 1997 WL 737692, *9 (U.S. Dec. 2, 1997) ("It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself."), *cert. denied sub nom. Marmolejo v. United States*, No. 96-7960, 1997 WL 82138 (U.S. Dec. 8, 1997). Conspiracy is itself a distinct offense and may be punished separately and consecutively with the object offense without offending the double jeopardy clause. *United States v. Felix*, 503 U.S. 378, 388-92 (1992); *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

This Court has ruled that the agreement in a Section 846 narcotics conspiracy is an "indisputably essential element of the offense." *Shabani*, 513 U.S. 10, 16 (1994). Moreover, "[t]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes." *Braverman v. United States*, 317 U.S. 49, 53 (1942). In finding a defendant guilty of a conspiracy, a jury must determine what unlawful objective a particular defendant actually agreed to commit.

In the case of a narcotics conspiracy, the identity of the drug is a central feature of the agreement. Congress has recognized this fact by providing vastly different



penalties for different drugs. As Congress has announced, a powder cocaine conspiracy is generally *not* the same as a crack cocaine conspiracy. A defendant charged with agreeing to distribute particular narcotics has thus agreed to commit that unlawful objective, and not just *any* drug conspiracy.

The government's position leads to results that cannot be squared with the principle that the essence of a conspiracy charge is the particular illegal agreement each defendant has made or entered. If the government's position were correct – that Congress only intended to require that the jury find an agreement to distribute just *any* controlled substance – the government could charge and prosecute a bare Section 846 violation without in any manner specifying the object offense or the identity of the drug in question. At trial, the government could present evidence of any of several drugs as it liked, and never have to present the jury with any particular, specific or definitive theory of the case. The jury would be instructed that it must convict if the jurors accepted any of the evidence, and the jury may not determine whether the defendants agreed on any particular object among the possibilities presented. Similarly, if the government's position were correct, the government could submit the identity of the controlled substance in a special interrogatory, then ignore the result if, for example, it turned out the verdict could not rest on the particular controlled substance found by the jury. For example, a defendant might show on appeal that he was lawfully permitted to distribute one of two narcotics charged in a conspiracy count on which the jury rendered a general verdict. Under the government's interpretation of Section 846, such a legal defect in the ambiguous verdict would be irrelevant and the verdict should stand. Such results contravene the basic requirements set forth in this Court's cases defining conspiracies as agreements which embrace specific illegal objectives.

### 4. Petitioners' Construction Provides a Consistent Role for the Jury in Deciding Section 846 Cases

The government concedes, as did the Seventh Circuit below, that Congress intended the jury to determine whether the defendant violated Section 846 by, for example, conspiring to commit a Section 841 crime versus some other object offense, such as a Section 843(b) violation. *See Edwards*, 105 F.3d at 1181 (agreeing that the court may not sentence on the more serious object of a multi-object conspiracy where the different objects appear in separate statutory provisions of the criminal code). There is simply no basis to believe, however, that Congress intended the jury to specify the object of a Section 846 offense where the charge identifies two different statutory provisions carrying different penalties (such as Sections 841(a) and 843(b)) as the object of the conspiracy, but not where the Section 846 charge identifies two different controlled substances carrying two vastly different penalties specified in different subsections of Section 841(b). Congress expressly incorporated the object of the conspiracy into the definition of the Section 846 violation. In the case of a Section 841(a) object, the Section 846 violation necessarily must specify the threshold facts to identify the statutory penalty range under Section 841, in exactly the same way it necessarily must incorporate the threshold facts to satisfy any distinct section of the Criminal Code, such as Section 843(b), as the object offense in the Section 846 conspiracy.

Petitioners' interpretation of Section 846 provides a consistent role for the jury in both kinds of Section 846 cases: those charging multiple sections of the Criminal Code as objects and those charging multiple drugs under Section 841. In contrast, the government's interpretation rests on drawing an insupportable distinction between Section 846 cases which have object offenses and penalties described in one section or subsection of the criminal code, and Section 846 cases which have object offenses and penalties divided in multiple subsections of the



Criminal Code. Nothing in the language or purpose of Section 846 indicates Congress' intent to distinguish the role of the jury in determining a defendant's guilt in conspiracies to violate Section 846.

### 5. The Government's and Seventh Circuit's Interpretation Would Constitute a Constructive Amendment of the Indictment in this Case

The Seventh Circuit agreed with the government's position below that the indictment and general verdict in this case established that Petitioners were convicted of conspiracy to commit the "one crime" of distributing narcotics. *See Edwards*, 105 F.3d at 1181 (majority of dual object conspiracy cases "have nothing to do with an indictment that charges the defendants with agreeing to commit *one crime* in *two ways*.") (emphasis in original). The Seventh Circuit's interpretation of the offense of conviction in this case as a single conspiracy to violate one statute, however, diverges from, and would constitute an amendment to, the offense that was actually charged to the jury.[10]

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[10] The Seventh Circuit's explanation that "[w]hat a jury believes about which drug the conspirators distributed therefore is not conclusive – and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options" is demonstrably incorrect. *Edwards*, 105 F.3d at 1181. A defendant convicted of a conspiracy to sell 1 gram of crack cocaine is subject to a maximum penalty of not more than 20 years. 21 U.S.C. § 841(b)(1)(C). A defendant convicted of conspiracy to sell 50 grams of crack cocaine is subject to a maximum penalty of not more than life imprisonment. 21 U.S.C. § 841(b)(1)(A)(iii). If a defendant were charged with two counts of conspiring to sell 1 gram and 50 grams respectively, but was acquitted of the 50 grams count, the maximum penalty the defendant could receive would be 20 years, the offense of conviction, no matter what the district court determined was relevant conduct and even if the court

The nature of the conspiracy alleged is determined from an examination of the four corners of the charging instrument. "The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction." *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978) (ellipsis and alterations in original, internal quotations omitted). Another Constitutional reason for requiring that the jury find only what is charged in the indictment is to enforce the Grand Jury Clause of the Fifth Amendment. In this case the government chose to seek a grand jury indictment naming two specific controlled substances in a single indictment. (J.A. 4-7). The government cannot now defend the conviction and sentences imposed on the grounds that the jury found a broader, different conspiracy to distribute controlled substances generally. *Stirone v. United States*, 361 U.S. 212 (1960); *see also United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir.) ("[T]he government through its ability to craft indictments, is master of the scope of the charged RICO conspiracy. . . . having set the stage, the government must be satisfied with the limits of its creation"), *cert. denied sub nom. Messino v. United States*, 479 U.S. 939 (1986).

In *Stirone*, the defendant was charged with a Hobbs Act interference with commerce by means of threats

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relied upon the acquitted conduct. Cf. *United States v. Watts*, ___ U.S. ___, 117 S. Ct. 633 (1997); *see United States v. Carrozza*, 4 F.3d 70, 81 (1st Cir. 1993) (statutory maximum sentence for RICO offense must be determined by conduct alleged in the indictment), *cert. denied sub nom. Patriarca v. United States*, 511 U.S. 1069 (1994). The jury's determination is thus critical in setting forth the maximum punishment allowed under the statute and the sentencing court would be restricted in its sentencing options.



affecting the importation of sand and other materials used in ready-mix concrete. 361 U.S. at 214. The trial judge admitted evidence of interference with shipment in interstate commerce of prospective steel products and charged the jury that its finding of guilt could rest on either the interference with sand importation or prospective steel product. *Id.* This Court concluded that the jury charge improperly permitted the defendant to be convicted on an offense not presented to the grand jury and therefore constituted a constructive amendment to the indictment. *Id.* "[W]hen only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." *See also United States v. Miller*, 471 U.S. 130, 145 (1985) (a broadening of the indictment through removal of allegations "essential to the offense on which the jury convicted" constitutes an impermissible constructive amendment).[11]

A recent decision of the United States Court of Appeals for the Second Circuit reaches the same result. In *United States v. Wozniak*, 126 F.3d 105, 108-09 (2d Cir. 1997), the Second Circuit held that instructing the jury that it could find the defendant guilty of a conspiracy to possess with intent to distribute "a controlled substance containing cocaine and methamphetamine" if it found

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[11] *See also United States v. Leichtnam*, 948 F.2d 370, 379-80 (7th Cir. 1991) (conviction for violating 18 U.S.C. § 924(c) premised on an indictment which identified the use and carrying of a specific identified firearm, cannot be supported on the possession of a different firearm without violating *Stirone*); *United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990) (RICO conspiracy indictment identifying the RICO enterprise as the "DeCavalcante Family" required the government to prove that enterprise and not just any enterprise).

"some controlled substance" constituted a constructive amendment of the indictment. In *Wozniak*, the evidence of the defendant's participation in a motorcycle gang drug ring exclusively involved marijuana, although the gang's drug activities involved cocaine, methamphetamine, and marijuana. *Id.* at 107-08. The government argued that Wozniak's participation with any kind of controlled substance would suffice because the type of controlled substance is not an element of the offense of narcotics conspiracy. *Id.* The trial court agreed and so instructed the jury. The Second Circuit reversed, concluding that the jury instructions constituted an "impermissible constructive amendment to the indictment." *Id.* The *Wozniak* court focused on the lack of notice to the defendant of the marijuana charges and emphasized that the conspiracy was wide-ranging, spanning one and a half years based on a large set of "operative facts."[12] *Id.* at 111.

The nature of the agreement between the Petitioners is not mere surplusage but is the core essential element the government had to prove beyond a reasonable doubt. To accept the Seventh Circuit's understanding of the agreement which constituted the offense of conviction in

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[12] The facts of the *Wozniak* case highlight perfectly the hidden dangers in multiple object conspiracies. Although defendant Wozniak was associated with members of the motorcycle gang, some of whom had extensive dealings in cocaine and methamphetamine, Wozniak's involvement was exclusively related to providing marijuana to these associates. *Wozniak*, 126 F.3d at 110-11. Had the government charged him in a multi-object conspiracy with marijuana, cocaine, and methamphetamine as its objects, a general verdict of guilty, under the government's view, would have exposed Wozniak to the mandatory minimums and maximums of those drugs, increasing his penalties based on a quantity ratio of 1000 to 1. *Compare* 21 U.S.C § 841(b)(1)(A)(vii) (requiring 1000 kilograms of a mixture containing marijuana) *with* 21 U.S.C. § 841(b)(1)(A)(viii) (requiring 1 kilogram of a mixture containing methamphetamines).



this case as simply an agreement to distribute controlled substances would constitute a constructive amendment and an impermissible broadening of the indictment in violation of this Court's decisions in *Stirone* and *Miller*. Thus, the government cannot avoid the ambiguity created by the general verdict in this case, by assuming the conviction rested on a ground not charged in the indictment or presented to the jury.

### 6. The Government's Position Advanced Below is Inconsistent with its Position, and this Court's Rulings, in Double Jeopardy Cases

The government argued in this case that a Section 846 count alleging multiple controlled substances constitutes a charge of conspiracy to commit a single offense, the distribution of any controlled substance under Section 841(a). The government's position in this case contradicts the position it has advocated, and the courts have generally accepted, that a defendant can be charged, found guilty, and cumulatively punished for multiple Section 841(a) offenses based on simultaneous possession with intent to distribute multiple types of controlled substances. *See, e.g., Richardson*, 86 F.3d at 1551; *United States v. Bonilla Romero*, 836 F.2d 39, 46-47 (1st Cir. 1987), *cert. denied*, 488 U.S. 817 (1988); *United States v. DeJesus*, 806 F.2d 31, 35-37 (2d Cir. 1986), *cert. denied*, 479 U.S. 1090 (1987); *United States v. Grandison*, 783 F.2d 1152, 1155-56 (4th Cir. 1981).

In these prior cases, the government claimed that Congress intended multiple punishments be imposed for the simultaneous possession of multiple drugs because possession of each drug constitutes a distinct crime under Section 841(a)(1). The government has argued that Congress intended the identity of the specific controlled substance to define separate criminal offenses under Section 841(a). The Courts of Appeal have accepted this argument and have held that such charges do not violate the

defendant's Double Jeopardy rights, because Congress provided that different drugs constitute different offenses under Section 841(a) even when the underlying facts supporting the conviction, such as time, place, participants, and mental state are identical. *Richardson, supra; DeJesus, supra.* Under these established principles and cases, then, a conspiracy to violate Section 841(a) by possessing with intent to distribute multiple drugs is *not* a conspiracy to commit *"one crime* in *two ways," Edwards,* 105 F.3d at 1181. In determining the statutory range of punishment, the District Court may consider only the *offense of conviction. See, e.g., United States v. Estrada,* 42 F.3d 228, 232 & n.4 (4th Cir. 1994); *United States v. Winston,* 37 F.3d 235, 240-41 (6th Cir. 1994); *United States v. Darmand,* 3 F.3d 1578, 1581 (2d Cir. 1993). The jury's verdict, therefore, must establish the offense of conviction on which the District Court will impose sentence, including the distinct statutory objects defined with respect to different drugs.[13]

This Court's recent decision in *Witte v. United States,* 515 U.S. 389 (1995), supports the Petitioners' construction of Section 846. In *Witte,* the defendant was charged with conspiring and attempting to possess 1000 pounds of marijuana with intent to distribute it in violation of 21 U.S.C. §§ 846 and 841(a)(1). Witte pleaded guilty to the attempted possession charge, but pursuant to the relevant

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[13] In other cases, the Seventh Circuit has observed the distinction between the offense of conviction and relevant conduct. *United States v. Lewis,* 110 F.3d 417 (7th Cir.) (statutory penalty looks to drugs involved in offense of conviction), *cert. denied,* ___ U.S. ___, 118 S. Ct. 149 (1997); *United States v. Rodriguez,* 67 F.3d 1312, 1324 (7th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S. Ct. 1582 (1996). *But see United States v. Reyes,* 40 F.3d 422, 427 (10th Cir. 1994) (Tenth Circuit rule requires court to consider all relevant conduct in fixing the statutory penalties and not merely drugs identified in offense of conviction).



conduct provisions of the Sentencing Guidelines, his sentence also took account of the importation of 1000 kilograms of cocaine and an additional marijuana shipment. *Witte,* 515 U.S. at 394. Witte was subsequently charged with the cocaine importation conspiracy based on the same facts of the relevant conduct as had given rise to the increase in his prior Guideline sentence. In concluding that the second prosecution did not constitute a second punishment in violation of the double jeopardy clause, this Court distinguished *the offense of conviction* from *relevant conduct* under the Sentencing Guidelines and held that the Double Jeopardy clause prohibits multiple punishment "only for the offense of which the defendant is convicted." *Id.* at 397. The drug transactions charged in the second trial merely constituted "evidence of related criminal conduct to enhance a defendant's sentence for a separate crime" charged in the first trial, even though by definition they arose out of the same common course of dealing as the offense charged in the first trial. *Id.* at 399. The two acts with two separate drugs constituted *separate crimes,* even though they were part of a single course of conduct. Similarly, in *United States v. Watts,* ___ U.S. ___, 117 S. Ct. 633 (1997) (*per curiam*), the Court held that a sentencing court may consider at a sentencing hearing evidence of acquitted conduct to enhance a defendant's sentence under the Sentencing Guidelines, because, as in *Witte,* the two courses of conduct (possession with intent to distribute cocaine and using a firearm in relation to that same drug offense) constituted distinct crimes, even though they were carried out simultaneously, in the same place, and as part of the same course of conduct.

This Court's decisions in *Witte* and *Watts,* and the lower courts' decisions in the Double Jeopardy cases cited above, collectively demonstrate that the offense of conviction under Section 846 is identifiable by the particular drug distributed or possessed. In these decisions, the courts have identified the count of conviction in a drug case as not involving simply "any controlled substance"

(which would have included related acquitted conduct or relevant conduct), but only the drugs and quantities identified in the indictment. In all other cases, the government seeks to *exclude* from its definition of the offense of conviction other related drug activities, so it can justify multiple prosecutions and punishments. In the present case, the government takes the opposite course in order to achieve a different result on the same facts. Here, the government seeks to *include* in its definition of the offense of conviction conduct related to any controlled substance (including amount and types of drugs) by defining the offense as simply a conspiracy to distribute *any* controlled substance. The government's current definition of the offense of conviction directly conflicts with its position in *Witte*, *Watts*, and other Double Jeopardy cases and should be rejected. The Seventh Circuit's decision in *Edwards* failed to recognize this fundamental divergence between its construction and the Double Jeopardy cases.

### 7. Petitioners' Interpretation of Section 846 Avoids a Sentencing Process That Would Violate Defendants' Sixth Amendment and Due Process Rights to a Jury Determination on Every Element of the Crime

The agreement reached among and between co-conspirators is an essential element of the offense of a Section 846 conspiracy. *Shabani*, 513 U.S. at 16. What the Petitioners agreed to do in violation of the law is a fact-based determination the government has a fundamental constitutional obligation to prove beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Moreover, the Fifth Amendment Due Process clause and the Sixth Amendment right to a jury trial "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Thus, the Petitioners are entitled to



have the jury determine what illegal agreement the Petitioners formed and agreed to participate in. *Sullivan*, 508 U.S. at 277 (Sixth Amendment right "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' ").

The Petitioners' Fifth and Sixth Amendment rights to a jury determination of all the essential elements of the offense is defeated in this case unless the Petitioners are sentenced on the agreement carrying the lesser punishment. If the government had charged the agreement to distribute cocaine in Count One and the agreement to distribute cocaine base in Count Two, a jury would consider and determine what the agreement between and among Petitioners was and whether each Petitioner joined which conspiracy. A jury finding of guilty on both counts as to each Petitioner would mean that the jury had determined each of the two essential elements – agreement and membership – as to each charged conspiracy and each Petitioner. A finding of guilty as to one count (cocaine conspiracy) but not guilty as to the other (cocaine base conspiracy) would mean that the jury considered the essential elements – agreement and membership – as to each count. A sentencing court could not, consistently with this Court's decisions in *Gaudin* and *Sullivan*, find one of the Petitioners guilty, even if convinced based on the evidence introduced at trial beyond a reasonable doubt, of the conspiracy charge of which the jury found the Petitioners not guilty. To do so would invade the province of the jury in violation of the Petitioners' Fifth and Sixth Amendment rights.[14]

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[14] The same result would be true even if the jury could not decide whether a particular defendant was a member of one conspiracy but found the defendant guilty of the other conspiracy. A sentencing judge could not permissibly conclude the defendant was guilty of the second count.

In this case, the jury's determination of guilt as to Count One could mean that the jury found that each of the Petitioners was a member of a cocaine base conspiracy, or each was a member of a cocaine conspiracy, or each was a member of a conspiracy with both objectives.[15] The general verdict means that the jury found each of the Petitioners guilty of some aspect of the conspiracy charged in Count One. The government's decision to charge the conspiracy in the manner it did deprives the Petitioners of a jury determination on which agreement the jury found existed and of which agreement the individual Petitioners were members. The sentencing court may not make the determination either of what the nature of the agreement was or what its essential object was as a matter of guilt even if it could consider evidence of the other conspiracy in deciding what sentence to impose.

### 8. Petitioners' Interpretation of Section 846 Avoids a Sentencing Process That Would Violate Defendants' Sixth Amendment and Due Process Rights to a Unanimous Jury Determination on Every Element of the Crime

The government's construction of Section 846, and the lower courts' decisions, would violate Petitioners' Sixth Amendment and Due Process rights to a unanimous jury verdict on the offense of conviction. As explained above, the general verdicts on the conspiracy count as to each Petitioner do not necessarily reflect a unanimous jury verdict that each Petitioner conspired to distribute powder cocaine, cocaine base, or both. Indeed, in light of

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[15] Of course, the jury might have concluded as well that some of the defendants were members of one conspiracy but not the other and thus were guilty of Count One, while the remaining defendants were members of the other conspiracy, but not the former and thus guilty of Count One.



the District Court's instructions, the jury may well have believed that it did not even have to consider whether all jurors agreed on the identity of the controlled substance in question and, therefore, may never have addressed the identity of the controlled substance in its deliberations. The sentences, however, assumed that the offense of conviction was conspiracy to distribute cocaine base. The interpretation of Section 846 adopted below, which permitted the District Court to assume that the offense of conviction included conspiracy to distribute cocaine base, would violate Petitioners' Sixth Amendment and Due Process rights, because the identity of the controlled substance must be treated as an element of a Section 846 conspiracy charge on which the defendant has the right to a unanimous verdict. Petitioners' construction of Section 846 would avoid these constitutional defects.

Federal criminal defendants indisputably have the right to a unanimous jury verdict under the Sixth Amendment and Rule 31(a) of the Federal Rules of Criminal Procedure. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). As Justice Powell explained, "[a]t the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *See* 406 U.S. at 371 (footnotes omitted) (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*). It is equally well-established that a criminal defendant is entitled to a determination of every element of a charged offense. *In re Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") It follows, then, that the Sixth Amendment entitles a federal criminal defendant to be sentenced on the basis that the offense of conviction is a

crime as to which the jury has unanimously determined all elements of that offense. A defendant's sentence based on an offense as to which the verdict does not establish the jury unanimously found all elements of the offense is unconstitutional. Since the verdict in the present case does not establish the jury unanimously found the object of the Count One conspiracy included cocaine base, the sentences are unconstitutional if the identity of the controlled substance in this case was an element of the Section 846 offense.

The identity of the controlled substance must be treated as an element of the Section 846 conspiracy charge for three reasons: (a) Congress intended that the jury determine the identity of the controlled substance in a Section 846 prosecution, (b) historical precedent supports treating the identity of the controlled substance as an element of the offense, and (c) the vastly different penalties associated with different drugs supports construing the identity of the narcotics as an element of the offense. Moreover, even if Congressional intent were only ambiguous, the rule of lenity would require the Court to treat the crime carrying the lesser penalty as the offense of conviction in the presence of an ambiguous Section 846 verdict.

In *Schad v. Arizona*, 501 U.S. 624 (1991), a plurality of this Court held that the question whether a particular issue must be decided unanimously by the jury is in the first instance a matter of legislative intent. Where the legislature intended the offense to include the specification of a given set of facts – in this case, the identity of the controlled substance – then the defendant has a constitutional right to have that fact decided unanimously by the jury. *Id.* at 630-31. Put another way, where the legislature intended two or more alternative sets of facts to establish multiple crimes, rather than just different ways to commit the same crime, then the defendant has the right to a unanimous jury verdict on the facts necessary to define the crime. In *Schad*, this Court addressed an



Arizona statute which defined first degree murder as either premeditated murder or felony murder. At trial in the case, the state had presented theories both of premeditated and of felony murder, and the jury's general verdict did not specify the theory on which it convicted; nor did the verdict demonstrate that the jury was unanimous in accepting either one theory or the other. This Court held that the ambiguous verdict did not violate the defendant's constitutional right to a unanimous jury verdict. The Court held first that the state legislature had the power to define the crime of first degree murder as a single crime, which could be committed in either of two different ways, in order not to require the jury to specify the manner in which the crime was committed. 501 U.S. at 628-29. The Court then relied upon the fact that the Arizona Supreme Court had already conclusively construed the first degree murder statute and had held that the statute was intended to define a single crime on which the jury need not reach a unanimous verdict on the specific means by which it was committed. *Id.* at 629. In *Schad*, therefore, the Court's holding rested upon the premise that the legislature had written the statute in question in order to define a single crime encompassing murder either by premeditation or in the course of a felony.

Here, in contrast to *Schad*, there is no legislative statement, either in the terms of Section 846 or in any legislative history, that Congress intended to define a Section 846 conspiracy to distribute controlled substances as a conspiracy to commit a single crime on which the jury would not determine the identity of the controlled substance in reaching its verdict. Here – unlike in *Schad* – there is no legislative mandate that the issue be taken from the jury. In addition, *Schad* addressed only the validity of the conviction, not the imposition of penalties,

and the Arizona first degree murder statute did not provide different penalties for premeditated and felony murder – much less the vastly different penalties possible for a Section 846 conspiracy.

The government's position here, moreover, conflicts with this Court's reasoning in *Griffin v. United States*, 502 U.S. 46 (1991). The government rests its argument on the premise that the Section 846 count in this case was a conspiracy to commit a "single crime" – a violation of Section 841(a). This premise cannot be squared with the Court's analysis in *Griffin*.

In *Griffin*, the Court upheld a Section 371 conspiracy to defraud an agency of the federal government by impairing the efforts of the Internal Revenue Service and the Drug Enforcement Agency ("DEA"). The conspiracy to defraud charge under Section 371 does not specify the identity of the federal agency which was the object of the fraud, and sentences imposed for violations of Section 371 do not vary depending on which agency was defrauded. The *Griffin* jury returned a general verdict. On appeal, the defendant showed that there was insufficient evidence to convict him of conspiring to defraud the DEA. 502 U.S. at 47-48. The Court ruled that the verdict could stand, because the insufficiency in the charge of conspiracy to defraud the DEA was merely *factual*, not *legal*. *Id.* at 55-58. The court contrasted the case before it with the line of decisions represented by *Yates v. United States*, 354 U.S. 298 (1957), where the Court held that where one of the objects of a multi-object conspiracy on which a defendant is convicted by a general verdict is *legally* insufficient (either on constitutional or statutory grounds), the conviction cannot stand. *Id.* at 51-58. In *Griffin*, the Court explained that the difference between decisions like *Yates* and decisions like *Griffin* is that in the case of factual insufficiency the courts can assume the jury reached its verdict on the basis of the object for which there was sufficient evidence, whereas in the case of legal insufficiency the courts cannot assume the jurors



unanimously picked the legally sufficient object as the basis of conviction. *Id.* at 59. In *Griffin*, therefore, had the defect in the charged conspiracy to defraud the DEA been *legal*, rather than factual, the conspiracy charge would have been constitutionally infirm, because the court could not determine that the jury reached a unanimous verdict.

On the government's view of Section 846 in this case, however, the entire decision in *Griffin* should have been unnecessary and irrelevant, because the *Griffin* defendants were found guilty of conspiring to commit a *single unlawful objective* (to defraud a federal agency) in two ways. On the government's view the defendant should have had no right to a unanimous jury verdict specifying the object of the offense. On the government's view, the Court in *Griffin* need merely have pointed out that the defect in one possible object of the conspiracy – regardless of whether the defect was legal or factual – simply had no bearing on the validity of the verdict. Contrary to the government's position here, *Griffin* stands for the proposition that the conspiracy defendant *does* have the right to a unanimous jury determination that he committed at least one of the object offenses in a multi-object conspiracy. For this purpose, Sections 371 and 846 are indistinguishable. The government's position here, therefore, contradicts the very basis or foundation of the Court's decision in *Griffin*.

Applying the principles set forth in *Griffin* to the sentencing determination, the present case is analogous to the legal infirmity cases represented by *Yates*, rather than the factual infirmity cases represented by *Griffin*. As in the legal infirmity cases, there is no basis here to infer that the jury could rationally have rested its verdict *only* on either cocaine base or powder cocaine. There was sufficient evidence to support either basis for the verdict. Here, as in the legal infirmity cases, no inference can be drawn from the verdict as to the object or objects – if any – on which the jury unanimously agreed in reaching its

verdict. In addition, Congress in Sections 841 (and in other sections which can be the basis for a Section 846 conspiracy) drew numerous *legal* distinctions among different kinds of narcotics, whereas in *Griffin* there was no *legal* distinction between conspiracy to defraud the DEA and conspiracy to defraud the IRS.

Finally, even if the Court finds that the legislative intent regarding the definition of a Section 846 offense is itself unclear or ambiguous from the language and history of the statute, the Court should still conclude that the identity of the controlled substance must be decided by a unanimous jury. In analyzing the right to a unanimous jury verdict where the legislative intent is unclear, courts should look to background considerations of (a) history, (b) the existence of highly disparate penalties, and (c) the rule of lenity. *See Schad*, 501 U.S. at 637. All these considerations argue that the identity of the narcotics in a Section 846 conspiracy case be decided by unanimous jury verdict.

The history of federal drug offense laws is especially telling. Prior to enactment of Section 841, the federal controlled substances laws were scattered throughout the code and, in most instances, separate substances were targeted and sentenced separately. As discussed above, Section 841 was the result of Congress' effort to organize the various existing substance laws into one section. In doing so, Congress retained the distinctions between different drugs and did nothing to suggest it intended to change the role of the jury when it changed the organization or groupings of the offenses into the various sections and subsections in the Criminal Code that exists today.

In addition, the penalties imposed under Section 841 vary according to the identity of the drugs involved. The vast differences in sanctions, in the absence of any legislative mandate to the contrary, strongly suggest Congress intended to have the jury determine the identity of the drugs in a Section 846 case.



Finally, the rule of lenity, which requires the construction of an ambiguous criminal statute in favor of the defendant, should operate to require jury unanimity on the identification of the narcotics to support sentencing in a multi-object conspiracy like the present case. This Court has applied the rule of lenity to the penalties imposed for criminal acts. *United States v. Granderson*, 511 U.S. 39 (1994); *accord Bifulco v. United States*, 447 U.S. at 400; *Ladner v. United States*, 358 U.S. 169, 178 (1958). Therefore, assuming Congressional intent is found to be unclear, the rule should be applied here to construe Section 846 to require the district court to sentence in multi-count conspiracy cases on the offense of conviction which carries the lesser penalty range.

### 9. The Seventh Circuit's Interpretation of Section 846 Would Lead to Violations of the Due Process Right to Timely Notice of the Maximum Statutory Penalty for an Offense

The government's and the Seventh Circuit's interpretation of Section 846 raises serious Due Process notice concerns. In its decision, the Seventh Circuit claims that a Section 846 indictment can charge conspiracy to distribute controlled substances "without identifying either the substances or the quantities." *Edwards*, 105 F.3d at 1181. This view of Section 846, however, deprives defendants of timely and effective notice of the maximum statutory penalties they face in violation of this Court's Due Process decisions.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589, 1598 (1996); *see also Miller v. Florida*, 482 U.S. 423 (1987) (Ex Post Facto Clause violated by retroactive imposition of revised sentencing guidelines

that provided longer sentence for defendant's crime); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Therefore, "vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *see also United States v. Brown*, 333 U.S. 18 (1948).

Specifically, this principle entitles a defendant to actual notice of the maximum penalty for the specific conduct charged. Therefore, one species of the Due Process notice problem arises where a statute includes multiple prohibited acts, each with different maximum penalties. Such statutes, and indictments under these statutes, must clearly specify which penalty provision goes with which each criminal act to avoid a Due Process infirmity. For example, in *United States v. Evans*, 333 U.S. 483 (1948), a federal statute clearly criminalized the act of "concealing and harboring aliens" but it also contained a variety of other prohibited acts and penalty clauses. Because the statute did not clearly indicate which penalty was intended for "concealing and harboring," the Court dismissed the indictment. In so holding, the Court stated that determining the correct maximum punishment for particular acts within a single statute was "a task outside the bounds of judicial interpretation." *Id.* at 495.

This Due Process right to notice of the maximum statutory penalty has not been altered by *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, a state statute provided that anyone convicted of certain felonies was subject to a mandatory minimum sentence of five years if the court found at sentencing that the defendant had visible possession of a firearm during the offense. The Court rejected a challenge that this sentencing factor had to be considered an element of the offense which required proof beyond a reasonable doubt under *In re Winship*, 397 U.S. 358. Critical to the Court's reasoning, however, was the fact that the firearm statute did not alter the statutory maximum penalty for each enumerated



offense committed. 477 U.S. at 87. In fact, the Court noted that the "maximum penalties for those offenses were established long before [the firearm statute] was passed." *Id.* at 86. Thus, whether or not a judge found that a firearm was involved in the offense, the statutory maximum for the underlying enumerated offense did not change. While not explicitly raised in *McMillan*, the Pennsylvania statute was also constitutional because the defendant had notice before trial of the statutory maximum for the underlying offense of conviction. A post-trial judicial determination of the statutory maximum, which this Court in *McMillan* noted might present a *Winship* issue, would also have presented a Due Process notice issue.

In this case, the Seventh Circuit's interpretation of Section 846 creates both notice and *Winship* problems. Allowing the government to indict without any reference to the threshold facts needed to determine which statutory maxima in Section 841(b) will apply deprives the defendant of meaningful notice of the maxima in his case. Under *Evans*, resort to the greatest statutory maximum for any act in the statute is simply insufficient to inform the defendant of the acts for which he was indicted and the statutory maximum he faces.[16]

Furthermore, actual notice of the maximum is futile unless the notice is also timely. In a variety of contexts, that means that the defendant is entitled to actual notice of the maximum penalty he may suffer before the proceeding that can impose that punishment begins. *See Lankford v. Idaho*, 500 U.S. 110 (1991) (reversing death

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[16] Some lower courts have misunderstood *McMillan's* distinction between statutory maxima and mandatory minima. For example, the Eleventh Circuit had held prior to the *McMillan* decision that in a dual object conspiracy a court must sentence on the object that carries the lesser statutory penalty. *See United States v. Alvarez*, 735 F.2d 461 (11th Cir. 1984); *but see United States v. Perez*, 960 F.2d 1569, 1574-75 (11th Cir. 1992).

penalty case where judge imposed death penalty at sentencing without notice to defendant and in disregard of the prosecutor's stated intention not to seek the death penalty). For example, a plea is invalid unless the defendant is made aware of the statutory maximum to which he is exposed before the plea is taken. *McCarthy v. United States*, 394 U.S. 459, 467 (1969); *United States v. Coscarelli*, 105 F.3d 984 (5th Cir. 1997) (trial court must advise defendant at plea hearing of maximum sentence for each object of conspiracy when defendant pled guilty to multi-object conspiracy); *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990) (prior to guilty plea, defendant entitled to notice of applicability of recidivism statutes that increase maximum penalty), *cert. denied*, 498 U.S. 1093 (1991); *accord United States v. Siegel*, 102 F.3d 477 (11th Cir. 1996).[17] Similarly, a defendant who invokes his right to trial by jury has a right to receive notice before trial of the statutory maximum he faces for that offense.[18] Just as a

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[17] Even in the context of the Sentencing Guidelines where sentencing takes place entirely within a statutory maximum, the Court has held that a defendant was entitled to notice of the judge's intent to depart upwards from the Guidelines before the sentencing proceeding began. *Burns v. United States*, 501 U.S. 129 (1991) (failure to so interpret Rule 32 would raise a "serious question whether notice in this setting is required by the Due Process Clause").

[18] *Olyer v. Boles*, 368 U.S. 448 (1962) does not suggest otherwise. In *Olyer*, a state statute permitted a recidivist information to be filed after conviction on a substantive offense and that filing could increase the statutory maximum. However, the defendant was required to separately plead to that information and the statute required the state to prove the prior convictions beyond a reasonable doubt. In absence of these special procedures that made the recidivist filing the virtual equivalent of a separate offense, the statutory scheme would have offended the due process notice issue raised herein. Thus, Petitioners do not argue that a legislature cannot choose to devise a mechanism other than the indictment for providing



defendant cannot knowingly plead guilty without knowing the statutory maximum he faces, he cannot chose to proceed to trial without that information.

Within Title 21 itself, Congress has shown that it is well aware of this timely notice obligation. In creating new enhancement penalties for prior narcotics offenses in 21 U.S.C. § 851, Congress required the government to file an information setting forth the prior convictions it contends would enhance the statutory maximum sentence. Failure to file this notice before trial bars an enhancement of the maximum sentence as a recidivist. Interpreting Section 851, the lower courts have recognized that Congress enacted Section 851 to fulfill the Due Process requirement that "a defendant receive reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism." *United States v. Belanger*, 970 F.2d 416, 418 (7th Cir. 1992); *United States v. Garrett*, 565 F.2d 1065, 1072 (9th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978) ("[F]ailure to comply with Section 851(b) renders the sentence illegal.").[19] However, for Section 846

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timely notice of an enhanced statutory maximum. Rather, we argue only that Congress did not do so for Section 846 conspiracies. Therefore, the indictment must serve as the means for providing such notice. A bill of particulars will not suffice because under Federal Rule of Criminal Procedure 7(f), the court has discretion to deny a defense request for a bill.

[19] As argued elsewhere, Petitioners contend that the explicit reference in Section 846 to the differing penalties provisions of Title 21 also shows that Congress intended the government to give the defendant notice of the statutory maximum in the indictment by requiring the specific object of the conspiracy to be named, whether it be the specific controlled substance in Section 841(b) or a separate provision of Title 21. Nor can the government argue any inferences from the absence of notice provisions similar to Section 851 in Section 846. The long-standing practice of the government has been to specify the controlled substance at issue in the indictment, *see* n.8 *infra*

conspiracies, Congress assumed that the government would continue to provide timely notice to defendants by including in the indictment sufficient information to determine the maximum sentence faced by a defendant. *See United States v. Gibbs*, 813 F.2d 596 (3d Cir. 1987) (in conspiracy count, listed overt acts in indictment served notice of maximum penalties; specification of threshold quantity of marijuana not required.), *cert. denied*, 484 U.S. 822 (1987); *United States v. Williams*, 107 F.3d 869 (4th Cir. 1997). Indeed, without identification of the drugs and quantity thresholds, the purpose of the notification requirement is defeated and the notice is ineffective, because the defendant will not know the specific penalty range that is being enhanced. *Compare* Section 841(b)(1)(A) *with* 841(b)(1)(B).

Thus, the Seventh Circuit's holding that such threshold information is not required would create a host of the Due Process notice problems that the foregoing cases prohibit. Without question, Congress acted within its power to create a statutory scheme that includes different statutory maximums for different types and quantities of narcotics in Section 841. An indictment for "conspiracy to distribute controlled substances" that the Seventh Circuit would permit, however, simply fails to provide timely and meaningful notice to the defendant of the true maximum penalty he faces.[20] An indictment only provides

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at 16. Congress is presumed to have been aware of this practice, obviating the need for a special provision here. Lastly, the meaning the government might attribute to Congressional silence runs counter to many other cases in which a deprivation of notice has been held to raise due process concerns. *See Burns*, 501 U.S. at 137-38.

[20] Taken to its logical end, the Seventh Circuit's opinion would permit a legislature to write an entire criminal code as one statutory section. All existing crimes could be included as subsections with separate penalty clauses. Thus, an indictment under this code could read, "violation of the criminal code, § 1."



satisfactory due process protection to the defendant if it fairly informs him of the crime with which he is charged and enables him to plead acquittal or conviction in bar of future prosecutions for the same offense. *Schooner Hoppet & Cargo v. United States*, 11 U.S. 389 (1813) (an indictment must contain "a substantial statement of the offence upon which prosecution is founded" and "cannot be satisfied by a general reference to the provisions of a statute"); *United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir. 1978), *cert. denied*, 439 U.S. 964 (1978). To be informed of the crime charged necessarily includes notice of both the conduct forbidden and the penalty prescribed. *See* 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* 1.2 (1986); *see also United States v. Evans*, 333 U.S. at 485-95; *United States v. Eaton*, 144 U.S. 677, 686 (1892). Thus, in its effort to assist the government in avoiding the sentencing conundrum created by its own charging decisions, the lower court has sanctioned a form of indictment that deprives the defendant of his Due Process rights.

Nor can the government overcome the Due Process implications of its position by contending that the defendant is always on notice that the maximum penalty under a Section 846 conspiracy is life because that is the maximum penalty under some subsections of the penalty provisions of Section 841. A defendant can have a legitimate need to know the true statutory maximum he faces before trial. For example, if a defendant is charged with two separate counts of conspiracy, one carrying a possible life sentence and another carrying less than life, his trial strategy might well be to attack the evidence on the life count more strenuously. In this case, if the government had chosen to charge the powder and crack conspiracies separately, the defendant might have been better able to expose the weaknesses of the crack conspiracy which

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A defendant would not know if he faced the maximum subsection penalty for jaywalking or for murder until sentencing.

carried the more severe penalty. In other words, if the government is permitted to co-mingle sub-provisions of Section 841 that carry different statutory maximums in a single count of Section 846, yet the court can sentence on the greater offense, the government can more easily obtain the more severe penalty than if the conspiracies were charged separately. Furthermore, because the Seventh Circuit holds that the defendant is not necessarily entitled to special verdicts on dual object conspiracies, there is no way to prevent the government from using this tactic to its advantage. Thus, condoning the Seventh Circuit's interpretation of how Section 846 may be charged and sentenced actually encourages the government to charge drug conspiracies in a manner that increases the risk of a variance between the jury's verdict and the correct statutory punishment. The Seventh Circuit opinion violates both the spirit and the letter of this Court's Due Process decisions. *See Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (Due Process should not require one to "speculate as to the meaning of penal statutes").[21]

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[21] The government cannot argue that the due process notice issue is moot in this case because these defendants were put on notice that the maximum penalty in this case was life because Count One included crack cocaine as an object of the conspiracy for two reasons. First, this argument undercuts the foundation of the Seventh Circuit's reasoning – that the wording of the indictment is irrelevant because all Section 846 and Section 841 indictments charge a single crime of conspiracy to distribute controlled substances. Second, these defendants were still faced with the strategic dilemmas identified above – they did not know before trial began, exactly how the jury would vote on the statutory maximums they faced. For example, a mid-trial ruling that there would be special jury interrogatories on the conspiracy count would dramatically have changed the nature of the trial.



### C. The Case Must Be Remanded For Resentencing

As Petitioners' sentences were imposed in violation of law and as a result of an incorrect application of the Guidelines, this case should be remanded to the District Court for resentencing. 18 U.S.C. § 3742(f)(1) provides that "if the court of appeals determines that the sentence was imposed in violation of law or as a result of an incorrect application of the Sentencing Guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." In *Williams v. United States*, 503 U.S. 193 (1992), this Court interpreted Section 3742(f) as obliging reviewing courts to determine whether "the sentence [was] imposed either in violation of law or as a result of an incorrect application of Guidelines[.] If so, a remand is required under § 3742(f)(1)." *Id.* at 202.

As the sentences imposed upon Petitioners either violated Petitioners' Fifth and Sixth Amendment rights or were in excess of the statutory maximum for an unspecified powder cocaine conspiracy, these sentences were imposed in violation of law. Section 3742(f)(1), as interpreted in *Williams*, requires no further analysis at this point; it requires only that the case be remanded for further sentencing proceedings.[22]

This Court held in *Williams* that not all errors under the Sentencing Guidelines will result in a remand; if the party defending the sentence can persuade the appellate court that the error was harmless, that is, "that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required." *Id.*

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[22] In *Williams*, the petitioner challenged a departure from the Guidelines. The Court of Appeals found two of the grounds stated for the departure valid and the other invalid, and affirmed the sentence. This Court vacated and remanded to the District Court for a determination of whether the sentence was imposed as a result of the invalid ground for departure. *Williams*, 503 U.S. at 206.

at 203. In this case, the error made by the district court judge was clearly not harmless. In developing and drafting the Sentencing Guidelines, the United States Sentencing Commission (hereinafter "Commission") recognized two differing approaches to sentencing – "real offense" sentencing, which bases sentences on the actual conduct undertaken by a defendant, regardless of the charges for which the defendant was indicted or convicted, or "charge offense" sentencing, which bases sentences upon the conduct that constitutes the elements of the offense for which the defendant was charged and convicted. Federal Sentencing Guidelines Manual ("Guidelines") § 1.A.4(a). The Guidelines embody a modified charge offense system, in which the offense of conviction plays an essential role in sentencing and is consistently distinguished from other, "real offense" elements.

The Guidelines provide a multiple-step sentencing process. The Guidelines direct the sentencing judge first to "[d]etermine the *offense* guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)" and, following the determination of what offense guideline section is applicable, then to consider other relevant conduct in determining the appropriate sentence. *Id.* § 1B1.2. Hence, the Guidelines draw a clear distinction between "offense of conviction" and "relevant conduct." This distinction is carried throughout the Guidelines. *See, e.g., id.* § 3B, Introductory Commentary; § 3E1.1, n. 1(a); § 3D1.1; § 4B1.1; § 5B1.1(b); 5D1.2(a). Each of these determinations is governed by the sentencing judge's determination of the offense of conviction.

Given that the sentencing levels for cocaine base are far greater than for the same amount of powder cocaine, and the different relevance that evidence of base cocaine would have in sentencing for a powder-only conspiracy as opposed to a conspiracy that includes cocaine base, this case must be remanded for resentencing or a new



trial. Law enforcement officers seized only small amounts of controlled substances in this case. Thus, the District Court, in making its determination of the amount and kind of controlled substance for which each Petitioner would be held responsible, considered primarily the testimony of various witnesses, and ascribed to Petitioners amounts that they could reasonably foresee as being in furtherance of the conspiracy. These witnesses described the movement of larger quantities of powder cocaine, and ascribed certain percentages of the cocaine to powder and certain percentages to base. The court then modified both the amount of the cocaine and the proportion of base to powder based on the credibility of the various witnesses. For example, the court sentenced Petitioner Fort on the conspiracy count based on his responsibility for 24 kilograms of cocaine, of which the court found half to be base. That amount and proportion, however, differed from the amount and proportion given by witnesses, who testified to greater amounts of cocaine, and that the proportion of base to powder was three to one. The judge, however, found that the witnesses so testifying were not entirely credible, and thus discounted their testimony by a certain percentage. Had the jury unambiguously found a powder cocaine conspiracy, the court may have found, for example, that any amount of crack cocaine would not be reasonably foreseeable by one who had entered into a powder conspiracy. Thus, in Fort's case, had the judge found the same amount of cocaine to be involved, but did not ascribe any of it to cocaine base, Fort's sentence would have been substantially less than the mandatory life sentence he received.

## CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court remand this case for resentencing or a new trial.

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Respectfully Submitted

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## Appendix

### Relevant Statutory and Constitutional Provisions

The Fifth Amendment of the Constitution of the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 U.S.C. § 846, "Attempt and conspiracy" provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter

shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18 U.S.C. § 841, "Prohibited acts" provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and



derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable

amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person



shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or



substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any



person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than



an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in > section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with > Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate



unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub.L. 98-473, Title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub.L. 99-570, Title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with > Title 18, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging



in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under > Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under > Title 18, or imprisoned not more than one year, or both.

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No. 96-8732

# In the Supreme Court of the United States

OCTOBER TERM, 1997

VINCENT EDWARDS, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether a general verdict of guilty in a federal prosecution for conspiracy to possess and distribute a controlled substance permits the sentencing court to consider only the type and quantity of drug involved in the conspiracy that would yield the lowest sentence under the Sentencing Guidelines.

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## BRIEF FOR THE UNITED STATES

## OPINIONS BELOW

The opinion of the court of appeals (J.A. 179-186) is reported at 105 F.3d 1179. The judgments and sentencing orders entered by the district court (J.A. 26-178) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 30, 1997. The petition for a writ of certiorari was filed on April 21, 1997, and granted on October 20, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

1. Sections 401 and 406 of the Controlled Substances Act, Pub. L. No. 91-513, Title II, 84 Stat. 1260, 1265, as amended, 21 U.S.C. 841 and 846, are reprinted at pages 2-15 of the appendix to petitioner's opening brief.

2. Sections 1B1.3, 2D1.1 and 6A1.3 of the Sentencing Guidelines promulgated by the United States Sentencing Commission, as amended to November 1, 1994, and portions of the accompanying commentary are reprinted in the appendix to this brief.

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, each petitioner was convicted of participating in a conspiracy to possess with the intent to distribute, and to distribute, cocaine and cocaine base ("crack" cocaine), in violation of 21 U.S.C. 846. Petitioners Tidwell, Edwards, and Wintersmith were also convicted of possession of crack cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Tidwell was convicted of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Petitioners were sentenced to terms of imprisonment ranging from 120 months to life. See page 6, *infra*. The court of appeals affirmed. J.A. 179-186.

1. The indictment in this case alleged that petitioners were members of a large conspiracy that distributed powder and crack cocaine from 1989 to 1993, primarily in Rockford, Illinois. J.A. 5-7. The conspiracy was organized and directed by a core group known as "the Mob." Tr. 775, 843. Members of



the Mob obtained kilogram quantities of powder cocaine, "cooked" some of it into crack cocaine, and then resold the drugs in smaller quantities in either powder or crack form. See, *e.g.*, Tr. 775, 789, 802, 835, 838-839, 874-882, 1723, 1768-1769. They held weekly meetings to discuss business, made key decisions by majority vote, and divided profits equally. See, *e.g.*, Tr. 808-811, 832, 835-836, 840, 885, 910, 1016-1017, 1267, 1293. The Mob employed "workers" to sell drugs and "runners" to keep the workers supplied and to retrieve drug proceeds. See, *e.g.*, Tr. 883-885, 1731, 1859; see also *United States* v. *Evans*, 92 F.3d 540, 541-542 (7th Cir.) (describing same conspiracy), cert. denied, 117 S. Ct. 404 (1996).[1]

2. In November 1993 a federal grand jury charged petitioners and 15 others with various federal drug and firearms crimes. See J.A. 4-12 (relevant counts). The first count of the superseding indictment charged that petitioners and others violated 21 U.S.C. 846 by conspiring "to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1)." J.A. 6-7. Petitioners Edwards, Wintersmith, and Tidwell were also charged with possession of cocaine base with the intent to dis-

---

[1] The activities of the conspirators from 1991 through 1993 are described in detail, with record citations, at pages 4-14 of the government's brief in the court of appeals. The district court's extensive findings, for purposes of sentencing, concerning petitioners' various roles and activities in connection with the conspiracy are set out at J.A. 37-39, 42-47 (Edwards); 64-70, 72-82 (Fort); 97-104, 107-112 (Wintersmith); 130-134, 136-141 (Joiner); 159-169, 172-174, 177-178 (Tidwell).

tribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Tidwell was charged with using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). J.A. 11-12.[2]

Five defendants pleaded guilty, and the remaining 15 were tried in three groups. J.A. 179. Petitioners were tried together in a three-week trial. The government's evidence showed that in 1991 and early 1992 the conspirators sold powder cocaine, but that from the spring of 1992 onward they dealt primarily in crack. See, *e.g.*, J.A. 73-82; Pet. 4; Tr. 843, 871, 873, 928, 1050, 1422; see also Tr. 1770. Evidence of the conspirators' involvement in the manufacture and sale of crack cocaine included the testimony of co-conspirators (see, *e.g.*, Tr. 849-855, 871, 872-873, 892-893, 928, 931, 948, 1416-1418, 1746-1750, 1768-1770, 1893-1897); numerous tape-recorded conversations relating to crack cocaine (see, *e.g.*, R. No. 1447, Gov't Exhs. 10, 12, 61); several purchases of crack from co-conspirators (see, *e.g.*, Tr. 1698-1703; R. No. 1447, Gov't Exhs. 175, 178-1, 192-1); seizures of crack from co-conspirators, including one seizure of almost a kilogram of crack (see, *e.g.*, Tr. 507, 528-531, 537-538, 669-677, 1046-1049, 1127, 2020-2022); and the recovery from Mob drug houses of crack-related paraphernalia such as baking soda boxes and both razor blades and paper towels coated with crack (see, *e.g.*, Tr. 569-570, 592-595, 600-601, 602-606, 638-639).

At the conclusion of the evidence, the trial court instructed the jury in part as follows (J.A. 16):

> The indictment charges in Count One that the defendants conspired to possess with the intent to distribute and to distribute cocaine and cocaine base and in Counts Four and Five that a certain amount of cocaine base was possessed with the intent to distribute.
>
> The government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. Neither does the government have to prove that the exact amount of cocaine base charged in the indictment was possessed with the intent to distribute. However, the government must prove that the conspiracy and the possession charges involved measurable amounts of cocaine or cocaine base.

[2] An additional count charging petitioner Fort with distribution of cocaine base was dismissed before trial.



Petitioners did not object to that instruction on the ground that it varied from the indictment, or on the ground that a guilty verdict would not reveal whether the conspiracy had involved powder cocaine, cocaine base, or both. J.A. 180; Tr. 2720-2721.[3] Nor did they object to the court's use of general verdict forms, which did not require that the jury specify which drug or drugs petitioners had conspired to possess and distribute. J.A. 180. The jury found each petitioner guilty of "the drug conspiracy charge contained in Count One of the indictment." J.A. 18-20, 22-23.

Before sentencing petitioners, the district court carefully reviewed the record (see, *e.g.*, J.A. 43, 73,

[3] Counsel for petitioner Tidwell objected that the instruction was "confusing as to that." Tr. 2720. The record does not clarify the basis for that objection. Petitioner Fort argued that the reference to a "measurable amount" was "confusing" because there was "no reference or determination what is a measurable amount." Tr. 2720-2721. The district court rejected both objections. Tr. 2721.

136) in order to determine what quantities of powder and crack cocaine should be attributed to each petitioner for sentencing purposes. Considering each petitioner separately, and often stating that it was using conservative or discounted estimates based on the evidence introduced at trial (see, *e.g.*, J.A. 74-75, 109, 112), the court attributed 14.5 kilograms of powder cocaine and 9.5 kilograms of crack to petitioner Fort (J.A. 72-82); 9 kilograms of powder and 9 kilograms of crack to petitioner Wintersmith (J.A. 107-112); 523.6 grams of powder and 448 grams of crack to petitioner Tidwell (J.A. 163-169); 201 grams of powder and 5.32 grams of crack to petitioner Edwards (J.A. 42-47); and 7 grams of powder and 14 grams of crack to petitioner Joiner (J.A. 136-141). Petitioners did not argue that the general form of the jury's verdict precluded the court from considering evidence of crack cocaine at sentencing.

Based on these type-and-quantity findings and other factors relevant under the federal Sentencing Guidelines, the court sentenced petitioners Fort and Wintersmith to life imprisonment for their roles in the conspiracy. J.A. 49-51, 87-89. Petitioner Wintersmith also received a concurrent sentence of 40 years' imprisonment for his possession offense. J.A. 89. Petitioner Tidwell was sentenced to concurrent terms of 252 months' imprisonment for conspiracy and 240 months' imprisonment for possession, with a consecutive term of five years' imprisonment for using and carrying a firearm during and in relation to a drug trafficking offense. J.A. 143-145. Petitioner Edwards was sentenced to concurrent 120-month imprisonment terms for conspiracy and possession. J.A. 26-28. Petitioner Joiner was sentenced to 126 months' imprisonment for conspiracy. J.A. 114-116. Each sentence also included a provision for supervised release and a $1000 or $2000 fine. See also Pet. Br. 4-5.



3. The court of appeals affirmed. J.A. 179-186. The court rejected petitioners' contention that, because the jury's verdict did not unambiguously establish that they had conspired to sell any crack cocaine, the district court should therefore have sentenced them, with respect to their conspiracy convictions, as if all of the cocaine involved in the conspiracy had been powder cocaine. J.A. 180-185. Although the court began by noting that petitioners had not objected to the district court's instructions or verdict forms on that basis, and that the plain-error standard of review therefore applied, it went on to hold, more broadly, that there was "no error, and hence no plain error, in this case." J.A. 180-181.

The court first observed that "under the Sentencing Guidelines, the judge alone determines which drug was distributed and in what quantity." J.A. 181. The court reasoned that under Sentencing Guidelines § 1B1.3, which requires the judge to take into account "relevant conduct" outside the offense of conviction, the judge must "consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment." J.A. 181. Therefore, the court continued, "[a] judge * * * may base a sentence on kinds and quantities of drugs that were not considered by the jury." *Ibid.* Indeed, "[b]ecause sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal." J.A. 182. Accordingly, "[w]hat a jury believes about which drug the conspirators distributed * * * is not conclusive—

and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options." *Ibid.*

The court acknowledged that some other courts of appeals have held that, when a jury returns a general verdict on a conspiracy charge that specifies the involvement of multiple drugs, the defendant must be sentenced as if the conspiracy involved only the drug carrying the lowest penalty. J.A. 181. The court declined to follow those decisions, however, because it concluded that they failed to honor the principle that the judge is responsible, under applicable law, for determining the type and amount of drugs involved in the conspiracy. J.A. 181-185.

## SUMMARY OF ARGUMENT

Petitioners were convicted of participating in a drug-trafficking conspiracy in violation of 21 U.S.C. 846. The indictment alleged that the conspiracy involved both powder and "crack" cocaine, but the jury was instructed that it could convict petitioners if it found that the conspiracy involved either drug. Petitioners argue that the jury's verdict does not make clear what drug or drugs they conspired to distribute, and that the district court was therefore required to sentence them only on the basis of the drug that would produce the lowest possible sentence.

Petitioners' sentences resulted from applying two sets of rules: the statutory maximum and minimum sentences specified in 21 U.S.C. 841(b), and incorporated by reference in Section 846, and the applicable provisions of the federal Sentencing Guidelines. The facts of this case present no statutory claim with regard to the type of drug involved in petitioners' offense, because computing the statutory sentencing



range for each petitioner solely on the basis of the powder cocaine involved in the conspiracy would not require any change in the sentences imposed by the district court. Accordingly, petitioners could benefit from their ambiguous-verdict claim only if district courts were required to determine Guidelines sentencing ranges solely on the basis of types of drugs necessarily considered by a jury in reaching its verdict.

No such rule could be squared with the "relevant conduct" provisions of the Guidelines themselves. Even if the district court in this case had assumed that petitioners' "offense of conviction" was solely a conspiracy to distribute powder cocaine, the Guidelines would nonetheless have required the court to take into account, in setting each petitioner's base offense level, any illegal activity involving crack cocaine that the court found to be part of the same "course of conduct" or "common scheme or plan" (or to be reasonably foreseeable as part of the conspiracy). Under this Court's decisions, the same result would have followed even if the indictment had never mentioned crack cocaine, or if it had charged a separate conspiracy to distribute crack and the jury had acquitted petitioners on that charge. Petitioners can therefore derive no sentencing benefit under the Guidelines from their theory that the jury's verdict was ambiguous as to the the type of controlled substance involved in the conspiracy.

Perhaps for that reason, petitioners advance a more ambitious theory in their brief on the merits than they advanced below or in their petition for certiorari. Petitioners argue, in effect, that in sentencing for a drug distribution conspiracy charged under 21 U.S.C. 841 and 846, a district court may not apply any of the

enhanced statutory sentencing ranges set out in Section 841(b) unless the government has pleaded, and a jury has determined, both the type and the *quantity* of drugs involved in the conspiracy. Neither the type nor the quantity of the drugs involved is, however, an element of the conspiracy offense defined by Section 846, or of the substantive distribution crimes defined by Section 841. The language and structure of the relevant statutory provisions make clear that type and quantity are factors to be taken into account at sentencing.

Petitioners raise a number of other arguments, most of them resting on the fundamental misconception that the conspiracy count in this case charged them with two different conspiracies. In fact, petitioners were charged with engaging in *one* conspiracy to engage in conduct that would involve committing a variety of substantive offenses. The indictment in this case satisfied applicable standards of notice, and nothing in the proof at trial or in the jury instructions constituted an impermissible amendment of the indictment. Nor does any aspect of petitioners' sentences violate principles of double jeopardy, deprive petitioners of any right to a valid jury verdict, or offend any general principle of the law of conspiracy.



## ARGUMENT

### THE DISTRICT COURT PROPERLY TOOK INTO ACCOUNT AT SENTENCING ALL OF THE DRUGS INVOLVED IN PETITIONERS' CONSPIRACY

The indictment in this case charged petitioners with violating 21 U.S.C. 846 by conspiring:

> to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

J.A. 6-7. At trial, the government introduced—as petitioners concede (Br. 37)—sufficient evidence to support a verdict that petitioners had conspired to traffic in either substance, or in both. The district court instructed the jury that it could convict petitioners of conspiracy if it found that "the conspiracy * * * involved measurable amounts of cocaine or cocaine base." J.A. 16. The jury then returned general verdicts finding each petitioner guilty of "the drug conspiracy charge" against him. J.A. 18-23. Petitioners contend that, because the quoted jury instruction was phrased in the alternative, the guilty verdicts are "fundamentally ambiguous" because they do not specify "the statutory object of the conspiracy" under 21 U.S.C. 846, and "[i]t is impossible to tell, therefore, whether the jury found the Petitioners each guilty of conspiracy to distribute powder cocaine only, cocaine base only, or both powder cocaine and cocaine base." Pet. Br. 9.

Petitioners do not challenge the validity of their conspiracy convictions. They argue only that the

sentences imposed by the district court are improper because they rest in part on the district court's determination—based largely on the same evidence that was introduced before the jury at trial—that petitioners' conspiracy involved the possession and distribution of both powder cocaine and cocaine base, or "crack." Petitioners' claim misunderstands both the nature of the offense charged in a prosecution under Section 846 and the role of the judge under the Sentencing Guidelines. Under a correct analysis, the court in this case properly took into account crack as well as powder in sentencing petitioners, even if, as petitioners claim, the jury instructions failed to require the jury to specify which of those controlled substances supported the conspiracy verdict against them.[4]

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[4] As petitioners note (Br. 9 n.5), the government conceded in its brief to the court of appeals (at 31 n.12) that the jury instructions allowed the jury to find them guilty of a conspiracy involving powder "or" crack cocaine. The court of appeals' decision (J.A. 180), the petition (at i, 8), and the government's response (at i, 9) all proceeded on the premise that the jury's general verdict was therefore ambiguous. A close reading of the relevant instructions (see pages 4-5, *supra*; J.A. 14-16) might support the view that the conjunction "or" in the critical sentence was intended to reflect the simultaneous discussion, in that sentence, of not only the conspiracy charge but also the possession charges, involving only cocaine base, that were also brought against some of the defendants. On that basis one might argue that, taking all the instructions together, the jury would have understood that it could find a conspiracy only if it found that petitioners' agreement involved "cocaine *and* cocaine base" (J.A. 16) (emphasis added). We do not raise such an argument at this stage. Cf. *Rogers* v. *United States*, No. 96-1279 (Jan. 14, 1998). We do observe, however, that the government argued below that the court of appeals could infer that the jury found a conspiracy involving crack cocaine because



### A. Petitioners' Activities Involving "Crack" Cocaine Were "Relevant Conduct" That The Court Was Required To Take Into Account Under The Sentencing Guidelines

1. The sentences imposed on petitioners resulted from the application of two bodies of law. First, the statutory sentencing ranges applicable to petitioners' conspiracy offense depended on the application of rules found in Title 21 of the United States Code. Section 846 of Title 21 provides that:

> Any person who attempts or conspires to commit any offense defined in [21 U.S.C. 801-904] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The government may therefore establish a violation of Section 846 by proving that the defendant agreed to commit any of a variety of substantive drug-trafficking offenses. See generally, *e.g.*, *United States* v. *Shabani*, 513 U.S. 10, 16 (1994); *United States* v. *Morgan*, 835 F.2d 79, 82 (5th Cir. 1987). Where the object offense is a distribution offense defined by 21 U.S.C. 841(a)(1), the applicable statutory penalties are established in Section 841(b). That subsection varies the applicable punishments depending on the type and amount of controlled substance involved in the of-

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three of petitioners were found guilty of substantive offenses involving crack, and because the evidence at trial overwhelmingly established that the conspiracy involved crack cocaine. Gov't C.A. Br. 33-35. The court of appeals did not reach those contentions. Accordingly, should this Court reverse the judgment below, it should nonetheless remand to the court of appeals to determine whether the conspiracy verdicts in this case were, in fact, ambiguous.

fense, any bodily injuries or deaths resulting from the offense, and the offender's criminal history. See 21 U.S.C. 841(b). Accordingly, fixing the applicable statutory maximum and minimum punishments for a Section 846 conspiracy to distribute controlled substances in violation of Section 841(a)(1) requires a sentencing court to turn to Section 841(b) and to determine, among other things, the types and quantities of controlled substances involved in the conspiracy offense.

The second step of the sentencing process then requires the application of the federal Sentencing Guidelines. See 18 U.S.C. 3551, 3553; see generally *Mistretta* v. *United States*, 488 U.S. 361 (1989). Guidelines § 2D1.1 specifies different base offense levels for drug conspiracies depending on, among other factors, the type and quantity of drugs involved, as determined by the district court for sentencing purposes (see Guidelines § 6A1.3).[5] The Guidelines do not base sentencing only on conduct underlying the offense of conviction. To the contrary, the "relevant conduct" provisions of Guidelines § 1B1.3 require the sentencing court to take into account, in a case such as this, both "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" and "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction." Guidelines § 2D1.1(a)(3), (c), and application note 12; *id.* § 1B1.3(a)(1)(B), (a)(2), and application note 3. The commentary to Section 1B1.3 explicitly confirms that "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." Guidelines § 1B1.3, background.

[5] The district court applied the Guidelines in effect as of November 1, 1994. See J.A. 73. All references in this brief are to that version of the Guidelines. We have reprinted relevant portions of the Guidelines and accompanying commentary in an appendix to this brief.



2. Petitioners claim (Pet. Br. 7-8) that where a jury verdict is ambiguous on the type of controlled substance involved in the offense, the defendant must be either retried or sentenced based on the drug "carrying the lowest statutory sentencing range." To the extent that petitioners' claim relates to *statutory* sentencing ranges, it is irrelevant to this case, because even if it were correct it would have no effect on the actual sentences imposed on petitioners. Computing the statutory maximum and minimum sentences for each petitioner solely on the basis of the powder cocaine the district court found was involved in the conspiracy in this case would not require any change to the terms of imprisonment imposed by that court.[6] Nor would petitioners'

[6] Under the penalty provisions of 21 U.S.C. 841(b)(1), the quantities of powder cocaine the district court attributed to the various petitioners (see page 6, *supra*) established statutory sentencing ranges of 20 years to life in prison for petitioners Fort and Wintersmith, 5-40 years' imprisonment for petitioner Tidwell, and up to 20 years' imprisonment for petitioners Edwards and Joiner. Even if the district court had considered that a conspiracy to distribute powder cocaine was the only offense of conviction, and therefore had considered the amounts of crack cocaine it attributed to each petitioner only as "relevant conduct" under the Guidelines, the Guidelines sentences it imposed on the conspiracy count—life imprisonment for Fort and Wintersmith, 21 years for Tidwell, 10 years for Edwards,

sentences change if the district court was permitted to determine the overall quantity of drugs involved in the conspiracy, but was then required (because of an ambiguous jury verdict) to assume that all of the drugs were powder rather than crack cocaine.[7] Accordingly, petitioners could benefit from the sentencing rule they propose only if some principle required district courts to determine sentencing ranges under

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and 126 months for Joiner—would have fallen within those statutory ranges.

Petitioner Joiner might conceivably argue (although he has not to date) that because he was sentenced only for conspiracy, and because the only applicable sentencing provision was therefore Section 841(b)(1)(C), the five-year term of supervised release imposed by the district court exceeded the three-year maximum term generally authorized by 18 U.S.C. 3583(b)(2) for an offense punishable by more than 10 but less than 25 years' imprisonment (see 18 U.S.C. 3559(a)(3)). Such a claim would lack merit. The better view is that because Section 841(b)(1)(C) requires the imposition of "at least" three years of supervised release, it has "otherwise provided" a supervised-release range within the meaning of Section 3583(b), and therefore supersedes the general maximum term specified in that Section. See *United States* v. *Page*, Nos. 96-4329 & 96-4345, 1997 WL 769370, at *3-*8 (6th Cir. Dec. 2, 1997) (discussing issue at length and joining the Second, Eighth, Ninth and Tenth Circuits in adopting that view); *United States* v. *Eng*, 14 F.3d 165 (2d Cir.), cert. denied, 513 U.S. 807 (1994); but see *United States* v. *Good*, 25 F.3d 218, 221 (4th Cir. 1994); *United States* v. *Kelly*, 974 F.2d 22, 24-25 (5th Cir. 1992). The supervised release term imposed on Joiner was also consistent with the Sentencing Guidelines in effect at the time of sentencing. See Guidelines § 5D1.2(a) (Nov. 1, 1994).

[7] Under that analysis, the statutory ranges would be the same as those set out in note 6 for all petitioners except Tidwell, who would move from the 5-40 year range of Section 841(b)(1)(B) to the 20 years-to-life range of Section 841(b)(1)(A). His 21-year sentence falls within both ranges.



the Sentencing Guidelines based solely on types and quantities of drugs necessarily established by a jury verdict. As the court of appeals recognized (J.A. 181), however, that proposition conflicts with the sentencing rules set forth in the Guidelines and with this Court's cases explaining the Guidelines' operation.

3. In *United States* v. *Watts*, 117 S. Ct. 633, 635-636 (1997) (per curiam), this Court observed that Guidelines § 1B1.3—the "relevant conduct" rule—describes "in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range." The Court noted that "[t]he commentary to that section states: 'Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.'" *Ibid.*, quoting Guidelines § 1B1.3, background. Applying that principle, the Court held that the sentencing court may consider conduct underlying charges of which a defendant was acquitted in determining the Guidelines sentencing range for offenses of which he was convicted, "so long as that conduct has been proved by a preponderance of the evidence" to the district court at sentencing. *Id.* at 638; see also *Witte* v. *United States*, 515 U.S. 389, 397, 401-402 (1995) (noting that relevant conduct provisions of the Guidelines simply channel the discretion of sentencing courts to take into account related uncharged misconduct in a manner comparable to pre-Guidelines practice). *Watts* thus makes clear that the entire range of a defendant's related criminal conduct, not simply the conduct underlying the jury's verdict of guilty, may be considered in calculating the defendant's Guidelines sentencing range.

Under that Guidelines principle, the sentences imposed on petitioners were proper—even if, as petitioners argue (Br. 7), the general verdict of guilty on the conspiracy charges against them was "fundamentally ambiguous," and the district court was therefore not permitted to "assume [that] the offense of conviction [was] conspiracy to distribute cocaine base." If the district court had "assume[d]" that the "offense of conviction" was a conspiracy with the sole "statutory object" of distributing powder cocaine (see *ibid.*), the Guidelines would nonetheless have required the court to take into account, for purposes of setting petitioners' base offense levels under Section 2D1.1, any illegal activity involving crack cocaine that was part of petitioners' "relevant conduct" under Section 1B1.3. The court would therefore have made the same factual inquiries and findings at sentencing concerning the type and quantity of drugs attributable to each petitioner for purposes of sentencing (see pages 5-6, *supra*); it would have arrived at the same Guidelines ranges; and there is no reason to question that it would have imposed the same sentences. See notes 6-7, *supra*.

That result would have followed even if the indictment in this case had never mentioned crack cocaine. See *Witte*, 515 U.S. at 392-394, 396-397; Guidelines § 1B1.3, application note 3 and background; *id.* § 2D1.1, application note 12. Indeed, it would have followed even if petitioners had been charged separately, under the same indictment, with a parallel count alleging conspiracy to distribute crack cocaine, as petitioners argue would have been permissible (Br. 10), and the jury had specifically *acquitted* them on that charge. *United States* v. *Watts*, *supra*. Petitioners have no basis for requesting any more



favorable result in the circumstances of this case, in which they received notice in the indictment itself that the government believed their crimes involved crack cocaine, and in which they concede (Pet. 37) that the jury could fairly have found them guilty of conspiracy based on the government's trial evidence involving crack cocaine alone.

4. As we acknowledged in our response to the petition in this case (at 10-11), at least three circuits have held that when a general verdict makes it impossible to know what drug or drugs the jury found were involved in a conspiracy, the district court must assume, for purposes of sentencing, that the conspirators dealt only in the drug that produces the lowest sentence under the applicable provisions of the Sentencing Guidelines. See *United States* v. *Bounds*, 985 F.2d 188, 194-195 (5th Cir.), cert. denied, 510 U.S. 845 (1993); *United States* v. *Pace*, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993); *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990).[8]

Those decisions are incorrect. None of them discusses (or even cites) the "relevant conduct" provisions of the Guidelines (*e.g.*, § 1B1.3), or the provision (§ 6A1.3) that explicitly commits the resolution of disputes over "factor[s] important to the sentencing determination" to the district court. Nor do they

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[8] The Tenth Circuit has extended its holding in *Pace* to sentencing following a guilty plea. *United States* v. *Bush*, 70 F.3d 557, 559-563 (1995), cert. denied, 116 S. Ct. 795 (1996). In pre-Guidelines cases, two other circuits relied on an "ambiguous verdict" theory in establishing the applicable statutory sentencing ranges for conspiracies to violate 21 U.S.C. 841. *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Alvarez*, 735 F.2d 461, 466-468 (11th Cir. 1984).

take into account the basic principles that sentencing courts may consider an essentially unlimited variety of information, and that they generally may find, under a preponderance-of-the-evidence standard, any facts that are relevant to their sentencing decisions. See, *e.g.*, 18 U.S.C. 3661; *Watts*, 117 S. Ct. at 635-638; *Nichols* v. *United States*, 511 U.S. 738, 747-748 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-93 (1986); Guidelines § 6A1.3, commentary. Indeed, the source of the sentencing principle applied in *Bounds*, *Pace*, and *Owens* remains mysterious. But whatever its source, that principle cannot be reconciled with the Guidelines sentencing process as described and upheld in *United States* v. *Watts*, *supra*. Because "relevant conduct" under the Guidelines includes related criminal acts as to which no jury ever found the defendant guilty, and because petitioners' crack cocaine activities undoubtedly qualified as relevant conduct, the judge properly took the crack cocaine quantities into account in this case, whether or not the conspiracy verdict itself is read to embrace them.

**B. Nothing In 21 U.S.C. 841 Or 846 Requires The Imposition Of Lower Sentences In This Case**

As we have observed (see notes 6-7, *supra*), petitioners' sentences would not be affected even if, as they contend, the sentencing court were required to calculate their statutory maximum and minimum penalties based solely on the *type* of drug producing the lowest statutory sentence. Perhaps for that reason, petitioners have, in their brief on the merits in this Court, framed statutory arguments that would sweep more broadly, requiring a jury determination of both the type and the *quantity* of substances involved in a drug conspiracy. They argue, for example, that a "Section 846 violation necessarily must specify the threshold facts to identify the statutory penalty range under Section 841." Pet. Br. 22. By "statutory penalty range," petitioners evidently mean one of the intermediate ranges (0-20 years, 5-40 years, or 20 years-life) set out in subsections (A)-(C) of Section 841(b)(1), rather than the full statutory range of no prison sentence at all to life imprisonment. Those intermediate ranges depend not only on the type of drug involved in the offense, but also on the quantity involved.[9]



Petitioners did not raise any such type-*and-quantity* claim either in the court of appeals or in their petition for a writ of certiorari.[10] A new claim is not properly presented for the first time in their brief on the merits in this Court. See, *e.g.*, *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 118 S. Ct. 542, 551-552 (1997); *Taylor* v.

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[9] For example, as petitioners note (Br. 23 n.10), a defendant who conspired to distribute 1 gram of crack cocaine is subject to a maximum term of 20 years' imprisonment, 21 U.S.C. 841(b)(1)(C), while a defendant who conspired to distribute 50 grams of crack cocaine is subject to a minimum 10-year prison term and a maximum term of life imprisonment, 21 U.S.C. 841(b)(1)(A)(iii).

[10] In the court of appeals, petitioners argued only that ambiguity in the jury's conspiracy verdict required either that they be retried or that sentence be imposed "on the basis of the quantity of powdered cocaine involved in the conspiracy." Pet. Joint C.A. Br. 39; see J.A. 180-181. The petition for certiorari in this Court appeared to raise the same claim. Pet. ii, 3-5, 8-16; see especially Pet. 8 ("issue raised" is whether general verdict on conspiracy involving "different kinds of drugs" requires sentencing "on the drug * * * carrying the lesser punishment"); see also U.S. Br. in Resp. I, 11-12 & n.4.

*Freeland & Kronz*, 503 U.S. 638, 645 (1992). In any event, petitioners' broad argument lacks merit.

1. Petitioners' suggestion that a jury verdict must comprehend all of the facts necessary to specify the statutory sentencing range under Section 841 would have significant implications. Because statutory sentencing ranges depend not only on the type, but also on the quantity, of drugs involved, see 21 U.S.C. 841(b)(1)(A)-(C), petitioners' argument must be that, in sentencing for a drug conspiracy charged under Sections 846 and 841(a), a district court may not apply any of the enhanced statutory sentencing ranges set out in Section 841(b) unless the government has pleaded in the indictment, and the jury has determined, both the type and the quantity of drugs involved in the conspiracy. Neither type nor quantity, however, is an element of the conspiracy offense punished by Section 846.

To be liable for conspiracy, "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas* v. *United States*, 118 S. Ct. 469, 477 (1997); see also, *e.g.*, *United States* v. *Richardson*, 86 F.3d 1537, 1546 (10th Cir.), cert. denied, 117 S. Ct. 588 (1996). In this case, the substantive offenses involved in the charged conspiracy are defined in 21 U.S.C. 841(a). Section 841(a), entitled "Unlawful Acts," provides in relevant part that:

> [I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.



21 U.S.C. 841(a)(1). Thus, so long as the government charges, and the jury finds, that a defendant engaged in specified conduct involving one of the various "controlled substances" identified in or under 21 U.S.C. 812, the offense is complete. See J.A. 183.

The specific nature and quantity of the substance or substances involved become relevant, under Section 841, only in applying subsection (b), entitled "Penalties." That subsection provides that, with certain exceptions, "any person who *violates subsection (a)* of this section shall be *sentenced*" according to rules that prescribe different maximum and minimum sentences for "violation[s] of subsection (a) of this section involving," or "in the case of," particular types and quantities of drugs. 21 U.S.C. 841(b)(1)-(4) (emphasis added). Subsection (b) also specifies additional adjustments for certain prior convictions, or if death or bodily injury results from the use of the substances involved. *Ibid.* These provisions make clear that the type and quantity of drugs involved in a substantive distribution offense under Section 841 are sentencing factors, not elements of the offense.[11]

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[11] The courts of appeals have consistently reached similar conclusions in a variety of particular contexts involving conviction or sentencing under Section 841. See, *e.g.*, *United States* v. *Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989) (type and quantity), cert. denied, 494 U.S. 1019 (1990); *United States* v. *Campuzano*, 905 F.2d 677, 679 (2d Cir.) (quantity), cert. denied, 498 U.S. 947 (1990); *United States* v. *Lewis*, 113 F.3d 487, 489-492 (3d Cir. 1997) (type and quantity), petition for cert. pending, No. 97-5586 (filed Aug. 13, 1997); *United States* v. *Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989) (quantity), cert. denied, 493 U.S. 1084 (1990); *United States* v. *Bounds*, 985 F.2d at 193-194 (Fifth Circuit) (quantity); *United States* v. *Levy*, 904 F.2d 1026, 1033-1034 (6th Cir. 1990) (type and quantity), cert. denied, 498 U.S. 1091 (1991); *United States* v.

Those factors may therefore be determined by the court for purposes of sentencing, without having been either charged in the indictment or found by the jury.[12] See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 84-91.

2. Because Section 841 itself does not require any jury determination of the type and quantity of drugs

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*Cooper*, 39 F.3d 167, 172 & n.4 (7th Cir. 1994) (and cases there cited) (type and quantity); *United States* v. *Gohagen*, 886 F.2d 1041, 1042-1043 (8th Cir. 1989) (per curiam) (quantity); *United States* v. *Kipp*, 10 F.3d 1463, 1465-1466 (9th Cir. 1993) (quantity); *United States* v. *Reyes*, 40 F.3d 1148, 1150-1151 (10th Cir. 1994) (quantity); *United States v. Williams*, 876 F.2d 1521, 1524-1525 (11th Cir. 1989) (type and quantity); *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.) (quantity), cert. denied, 506 U.S. 901 (1992).

[12] The conclusion that type and quantity are not elements of the offense under Section 841 disposes, *a fortiori*, of petitioners' argument (Br. 30-39) that they have been unconstitutionally denied a jury determination on every element of the crime of which they were convicted. There is no question that petitioners had a right to have the jury find that they had entered into a criminal agreement in violation of Section 846. See Pet. Br. 30-31. There is also no question that the jury so found, and that the evidence before it concerning both powder and crack cocaine was sufficient to sustain that finding. See *id.* at 37. It is not true, however, that "the identity of the controlled substance must be treated as an element of a Section 846 conspiracy charge on which the defendant has the right to a unanimous verdict," or that petitioners' sentences "assumed that the offense of conviction was conspiracy to distribute cocaine base." *Id.* at 33. As petitioners concede, even if the government had charged them with two conspiracies, and even if the jury had acquitted on one charge, the court could nonetheless have "consider[ed] evidence of the other conspiracy in deciding what sentence to impose." *Id.* at 32; see, *e.g.*, *Watts*, *supra*. Even on petitioners' interpretation of the indictment and verdict, that is all that happened here.



involved in a defendant's conduct (other than a determination that it involved a detectable quantity of some controlled substance) in order to convict and sentence a defendant for a substantive distribution offense, Section 846 requires no similar determination in order to find and punish a conspiracy to violate Section 841. Petitioners argue (Br. 11-17) that because Section 846 punishes agreements to commit substantive drug offenses, and because it incorporates by reference the penalties applicable to those offenses, Congress must have intended that the jury find, "as an element of the [conspiracy] offense" (Br. 15), every fact necessary to determine the applicable penalty under the substantive provision. The language of Section 846, however, requires only that the government plead and prove an agreement to commit one or more substantive offenses, the elements of which are defined in other provisions. If the defendant is convicted of entering into such an agreement, then Section 846 authorizes the court to impose the punishments authorized for those substantive offenses. Petitioners suggest no reason for requiring the government to plead or prove more to establish an agreement to violate Section 841(a)(1), or to impose an appropriate punishment for that agreement, than it would have had to show to convict and punish the defendant for a completed substantive offense under that Section.

If the type and quantity of drugs involved in a conspiracy were truly "elements" of the offense defined by Section 846, the failure to plead and prove those elements would invalidate not only petitioners' sentences, but their conspiracy convictions as well. Petitioners, however, have not advanced that claim,

either in this Court or in the courts below.[13] Moreover, petitioners' interpretation would seemingly also require the government to plead and prove to the jury prior convictions (or any other statutory factor) that might affect the defendant's sentence under a particular substantive provision. See, *e.g.*, 21 U.S.C. 841(b)(1)-(3). As petitioners concede (Br. 15), however, Congress plainly intended that prior convictions, at least, would be proved to the court at sentencing, rather than to the jury at trial. See 21 U.S.C. 851.

Petitioners' arguments based on legislative history (Br. 17-19) are no more persuasive. It is true that Congress amended Section 846, in 1988, to clarify that it was meant to incorporate the minimum, as well as the maximum, penalties prescribed for the various substantive offenses that might be the objects of a drug conspiracy. Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6470(a), 102 Stat. 4377. Contrary to petitioners' contentions (Br. 17-18), however, neither that clarifying amendment, nor the fact that there are statutory minimum penalties for some offenses but not for others, implies anything about whether Section 846 requires pleading or proof of the type (or amount) of a controlled substance involved in a conspiracy to violate Section 841(a). Nor does the proposition (Pet. Br. 18-19) that Congress has long considered the type and quantity of substances involved to be highly salient factors in measuring the gravity of a drug offense suggest that

[13] Amici National Association of Criminal Defense Lawyers *et al.* do expressly embrace that argument (Br. 7, 26 n.14). Although amici take petitioners' theory to its logical conclusion, if accepted that theory would radically tranform the trial of drug conspiracy charges under Section 846 in a manner that has no support in the statute or relevant precedent.



Congress intended to make those considerations elements of the offense. Section 841, as Congress enacted it, gives great weight to type and quantity as sentencing factors. Section 846 incorporates those factors, and the maximum and minimum sentences that may depend on them, through its simple cross-reference to all of the substantive drug offenses and their respective statutory penalty provisions.

### C. The Sentences Imposed In This Case Are Consistent With The Constitution And With General Principles Of Conspiracy Law

Petitioners raise a number of other arguments attacking the validity of the sentences imposed in this case. Pet. Br. 20-46. Most of those arguments rest on the same fundamental misconception.[14] Petitioners insist (Br. 10) that they were indicted for a conspiracy that involved "multiple possible objects: an agreement to distribute cocaine, an agreement to distribute cocaine base, or an agreement to do both." As the court of appeals recognized (J.A. 183-184), however, that is an inaccurate description. The indictment in this case charged petitioners with participating in *one agreement* to commit substantive offenses of two sorts (distribution of a controlled substance and possession of such a substance with the intent to distribute it), involving two particular controlled substances (powder and crack cocaine). See *Braverman* v. *United States*, 317 U.S. 49, 54 (1942) ("The allegation in a single count of a conspiracy to commit

[14] Most of them are also being made for the first time in this Court. See page 21 and note 10, *supra*. Compare, for example, Pet. Br. 23-27 with J.A. 183-184 (mentioning *Stirone* v. *United States*, 361 U.S. 212 (1960), but noting that "defendants do not argue variance").

several crimes is not duplicitous, for the conspiracy is the crime, and that is one, however diverse its objects.") (internal quotation marks omitted). The jury returned guilty verdicts after the judge correctly instructed that it could find petitioners guilty of conspiracy if it found that the government had proved an agreement to commit any one of the crimes specified in the indictment. J.A. 14-16; see *Turner* v. *United States*, 396 U.S. 398, 419-420 (1970); *Griffin* v. *United States*, 502 U.S. 46, 49-51, 56-60 (1991). The sentences that the judge subsequently imposed fall within the limits specified in the applicable statutory and Guidelines provisions. At no step in this process can petitioners show constitutional or legal error.

1. The court of appeals suggested that an indictment under 21 U.S.C. 841 and 846 "could charge the defendants with 'conspiring to distribute controlled substances,'" without specifying either the type or the quantity of the substances involved. J.A. 183. Petitioners argue at length (Br. 39-46) that an indictment in that form would deprive the defendants named in it of a due process right to timely notice of the maximum statutory penalty for the offense with which they were charged. That is incorrect, but in any event the argument has little to do with this case.

The indictment in this case *did* identify the particular controlled substances that petitioners were charged with conspiring to possess and distribute. It did not specify any quantity, and petitioners had not heretofore complained of that omission; yet, as petitioners concede, specification of quantity would be essential to give a hypothetical defendant any more notice of applicable penalties than he would receive from the Seventh Circuit's hypothetical indictment. See Pet. Br. 44 ("[W]ithout identification of the drugs



*and quantity* thresholds, the purpose of the notification requirement is defeated and the notice is ineffective.") (emphasis added). Petitioners knew the type of drugs they had been charged with distributing, and they had full access to the statutory and Guidelines sentencing provisions that would determine what sentences would be available. They were not further entitled to notice of the specific quantities of drugs that the government had reason to believe were involved in the conspiracy.

The indictment in this case, by charging a conspiracy to possess and distribute both powder and crack cocaine, in a specific place, within a specific time frame, and with specific participants (J.A. 5-10), adequately apprised petitioners of the nature of the charges they must be prepared to meet at trial, and sufficiently identified the offense at issue to allow them to plead the indictment in bar in any subsequent prosecution for the same offense. Those are the constitutional standards of notice that apply to an indictment. See, *e.g.*, *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117-119 (1974); *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962).[15] What petitioners evidently now demand is pre-trial access to specific information concerning what evidence the government actually possesses and will be able to prove at trial or at sentencing. That claim relates to the appropriate limits of criminal discovery; it has

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[15] Various non-constitutional notice requirements may also apply. See, *e.g.*, Fed. R. Crim. P. 7(c)(1) (requiring any indictment to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged") and (f) (bills of particulars).

nothing to do with the question on which this Court granted review.

2. Petitioners contend (Br. 23-27) that, even if the indictment in this case was facially sufficient, the jury's verdict and the sentence that the court imposed somehow involved a "constructive amendment" of that indictment. That claim is difficult to understand, because the remedy for a true constructive amendment would presumably be reversal of petitioners' convictions, not merely a limitation on their sentence. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212 (1960). In any event, the argument is without merit.

Petitioners rely on *Stirone* and on *United States* v. *Wozniak*, 126 F.3d 105 (2d Cir. 1997). In *Stirone*, the defendant was charged with interfering, through extortion, with the movement of sand through interstate commerce, but the jury was instructed that it could convict based on evidence presented at trial that the defendant had also interfered with the interstate movement of steel. 361 U.S. at 213-214. This Court concluded that that instruction added a "new basis for conviction" that differed substantially from the charge set out in the indictment, and therefore violated the defendant's right to be convicted only on a charge actually preferred against him by the grand jury. 361 U.S. at 217. In *Wozniak*, the Second Circuit applied *Stirone* to hold that, on particular facts, proof at trial of distribution and use of marijuana could not support conviction under an indictment that charged only transactions in methamphetamine and cocaine. 126 F.3d at 109-111.[16] Those cases have no

[16] Differences between the types of drugs specified in an indictment and those shown to have been involved in the transactions proved at trial are not necessarily fatal. See, *e.g.*, *Wozniak*, 126 F.3d at 110-111 (distinguishing *United States* v. *Knuckles*, 581 F.2d 305 (2d Cir.), cert. denied, 439 U.S. 986 (1978)); *United States* v. *Lewis*, 113 F.3d at 492-493 (no variance where indictment specified crack cocaine but jury might have found powder).



application here. The indictment in this case specified both powder and crack cocaine, the proof at trial involved both of those substances and no other, and the jury was not instructed that it could base its verdict on evidence of transactions involving any other drug.

Petitioners argue (Br. 23-24) that there was an impermissible variance because the government charged two conspiracies (one involving powder and one involving crack), but the court of appeals upheld petitioners' sentences on the theory that they had been found guilty of only one conspiracy involving two drugs. As we have explained, the premise of that argument is false: The government charged only one conspiracy in this case. Even if the government had charged two different conspiracies in one count, however, proof of either one would have been sufficient to support petitioners' convictions. See, *e.g.*, *Miller*, 471 U.S. at 135-136; *Griffin*, *supra* (general verdict of guilty on a multiple-object conspiracy charge may be valid if sufficient evidence exists to support any of the objects). Moreover, in this case, the permissible penalties for each of the two conspiracies that petitioners posit would have been established by the same criminal statute (Section 841), and the indictment in no way limited the sentence that could permissibly be imposed with respect to either hypothetical separate conspiracy. Accordingly, on the facts of this case, petitioners can show neither any variance between

the indictment and their convictions, nor any uncertainty about the proper determination of their sentences.

The case would be more difficult if there were some plausible way to assign different statutory maximum penalties to the different possible grounds for conviction specified in the indictment, and if the sentencing court imposed a sentence in excess of the lower statutory maximum. See, *e.g.*, Pet. Br. 22-23 & n.10; J.A. 182-184; *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *Brown* v. *United States*, 299 F.2d 438 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962). If a defendant were convicted on only one *substantive* count of, for example, using a communication facility in committing a felony drug offense, in violation of 21 U.S.C. 843(b), then the court could impose no more than the maximum prison term authorized by Section 843(d) for that offense—even if the government's evidence, at trial or sentencing, established beyond any doubt that the defendant had also distributed large amounts of crack cocaine. We do not concede, however, that the same analysis applies in the context of a conspiracy to violate more than one statute, where the different object offenses have different sentencing provisions and a general verdict does not identify which statute or statutes the conspirators agreed to violate. Compare *United States* v. *Ross*, No. 96-3556, 1997 WL 780056, at *20-*27 (11th Cir. Dec. 19, 1997) (under the Guidelines, court may determine the object(s) of a conspiracy in violation of 18 U.S.C. 371 at sentencing, but should apply the beyond-a-reasonable-doubt standard); *United States* v. *Conley*, 92 F.3d 157, 165-167 (3d Cir. 1996) (same), cert. denied, 117 S. Ct. 1244



(1997); Guidelines § 1B1.2(d) & application note 5 (same).[17]

The resolution of that issue would not, in any event, affect petitioners' sentences. Even if the indictment returned against petitioners could be read to charge, alternatively, either a conspiracy to distribute cocaine or a conspiracy to distribute cocaine base, the indictment contained no specification as to the quantity of either drug involved in petitioners' offense. A conviction on either basis would therefore have rendered each petitioner statutorily amenable to punishment ranging from no prison term to life in prison, depending on the quantity of the drug involved—a fact

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[17] As petitioners point out (Br. 28 & n.13), some courts have held that, in determining statutory sentencing ranges under Section 841(b), a court may rely only on quantities of drugs that were "involved" in the "offense of conviction." See *United States* v. *Lewis*, 110 F.3d 417, 422-423 (7th Cir.), cert. denied, 118 S. Ct. 149 (1997); *United States* v. *Estrada*, 42 F.3d 228, 232 & n.4 (4th Cir. 1994); *United States* v. *Winston*, 37 F.3d 235, 240-241 (6th Cir. 1994); *United States* v. *Darmand*, 3 F.3d 1578, 1581 (2d Cir. 1993); compare *United States* v. *Reyes*, 40 F.3d 1148, 1150-1151 (10th Cir. 1994) (sentencing court may consider quantities established at sentencing). With respect to conspiracies under Section 846, however, even the cases on which petitioners rely have recognized that the inquiry into what drugs were "involved" in the Section 846 offense is very similar to the question of relevant conduct under the Guidelines, because "each conspirator is responsible for drug amounts handled by co-conspirators if those amounts were foreseeable to him and in furtherance of the jointly undertaken criminal activity to which he agreed." *Lewis*, 110 F.3d at 423; see also *Estrada*, 42 F.3d at 232 n.4 (in a conspiracy case, sentencing court "must assess the offense of conviction conduct to determine the quantity of drugs that was reasonably foreseeable to the defendant and within the scope of the defendant's agreement.").

that the district court would necessarily have found at sentencing. As we have explained (see pages 14-19, *supra*), the Guidelines would then have required consideration of all of each petitioner's relevant conduct, as found by the court; and the sentences the court imposed under the Guidelines were within the proper statutory ranges, however those ranges might be calculated (see pages 15-16 & notes 6-7, *supra*).

3. Petitioners contend (Br. 27-30) that sentencing them for a drug conspiracy (as found by the jury) on the basis of all the drugs the conspiracy involved (as found by the district court) conflicts with cases that have addressed whether particular acts, in violation of particular statutes, constitute separate "offenses" for purposes of the Double Jeopardy Clause. Petitioners rely (Br. 28-29) on cases indicating that two separate offenses may be charged based on one course of conduct. See, *e.g.*, *United States* v. *Watts*, 117 S. Ct. at 634 (use of a firearm (21 U.S.C. 924(c)) and possession with intent to distribute (§ 841(a)); separate instances of possession with intent (§ 841(a))); *Witte* v. *United States*, 515 U.S. at 392, 394, 396 (attempted possession with intent to distribute (§§ 841 and 846) and conspiracy and attempt to import (§§ 952(a) and 963)). Contrary to petitioners' assertion (Br. 29-30), however, nothing in *Watts*, *Witte*, or the lower court cases on which petitioners rely stands for the broad proposition that "the offense of conviction *under Section 846* is identifiable by the particular drug distributed or possessed" (emphasis added). A conspiracy offense is different, for Double Jeopardy purposes, from the substantive offenses that particular conspirators may have committed during the conspiracy. *United States* v. *Felix*, 503 U.S. 378, 387-392 (1992); *Pinkerton* v. *United States*, 328 U.S. 640



(1946). It is defined by the scope and nature of the conspirators' agreement. That agreement may be limited to one or more specific crimes, such as the distribution of a particular controlled substance on a particular occasion, or it may encompass the commission of multiple crimes. The scope of the agreement depends on the intentions of the particular conspirators involved. *Braverman*, 317 U.S. at 52-53.

The conspiracy count in this case charged one "offense" because it charged one conspiracy—*i.e.*, one agreement. That one agreement, however, contemplated the commission of hundreds, if not thousands, of separate substantive offenses, involving the possession and distribution of different controlled substances at different times and places. See J.A. 7-10 (indictment). The fact that such multiple offenses might support cumulative punishment in a prosecution for the substantive crimes (see cases cited at Pet. Br. 27) is in no way inconsistent with the view that, in a conspiracy case, a single agreement may embrace a plan to commit multiple substantive crimes.

For much the same reason, petitioners' discussion (Br. 34-38) of *Schad* v. *Arizona*, 501 U.S. 624 (1991), and *Griffin* v. *United States*, *supra*, does not help them. The plurality opinion in *Schad* indicates that the requirement of a unanimous jury verdict does not require jurors to agree on a particular alternative means of committing an offense, where there is widespread use of an offense definition involving such alternative means and where the means are of rough moral equivalence. 501 U.S. at 637-645. A single conspiracy to undertake a course of conduct that would involve violating Section 841 in various different ways satisfies that standard. An agreement to

violate a particular drug law may be carried out through a variety of means (such as by distributing either crack or powder cocaine), but each of those means satisfies the same element of the offense. Petitioners cite no historical evidence that that is a "freakish definition of the elements of the offense," *Schad*, 501 U.S. at 640 (plurality opinion), or that there is any substantial difference in the morality of the alternative "means" involved in this case.

Nor does *Griffin* assist petitioners. The common law rule, the Court observed in that case, is that "a general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds." 502 U.S. at 49. That rule "applied to the [conspiracy] situation at issue [in *Griffin*]: a general jury verdict under a single count charging the commission of an offense [*i.e.*, a conspiracy to defraud the government, in violation of 18 U.S.C. 371] by two or more means" —*i.e.*, by obstructing one federal department or another. *Id.* at 50. That holding does not support petitioners' contention (Br. 37) that, in a drug conspiracy case involving two means of violating the same substantive offense, the jury must specifically agree on which means (*e.g.*, distributing which of two controlled substances) forms the basis of the verdict.

4. All of the claims discussed above grow out of petitioners flawed argument (Br. 20-21) that the government's position is inconsistent with "general conspiracy principles." We agree with petitioners (Br. 20) that the agreement to commit some crime is the essence of a conspiracy offense. There is no support, however, for their assertion that "the identity of the drug is a central feature of the agreement" in a conspiracy under Section 846.



An agreement violates Section 846 if it contemplates the commission of acts that, taken together, will satisfy all the elements of one of a number of specified drug trafficking offenses. Cf. *Salinas*, 118 S. Ct. at 477. The specification of those elements is, in turn, "entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994). As we have explained (see pages 22-23, *supra*), Congress has structured Section 841(a) so that it is violated by the distribution of any "controlled substance"; and an agreement to distribute any such substance is therefore a complete conspiracy. See *United States* v. *Gomez*, 905 F.2d 1513 (11th Cir. 1990) (defendant may be convicted and punished for conspiracy and possession even if he knew only that the substance involved was an illegal drug), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Herrero*, 893 F.2d 1512, 1534-1535 (7th Cir.) (similar), cert. denied, 496 U.S. 927 (1990). For example, an agreement between two individuals to purchase, divide, and resell a shipment of illegal drugs that one of them expects to receive from a criminal contact violates the law—even if the conspirators do not know, at the time that they agree, what type of drugs the contact will be able to procure.

Of course, the point is largely theoretical. Generally, as here, the drugs involved in a conspiracy will be known to the conspirators; and generally, as here, at least the type or types of drug involved will be identified in the indictment and proved at trial, although the jury will not be asked to render a specific verdict concerning type or quantity. That practice accords as well with generally applicable principles of fair notice. See, *e.g.*, *Miller*, 471 U.S. at 134-135; Fed.

R. Crim. P. 7(c)(1) (requiring any indictment to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged"). In light of those principles, there is no foundation for petitioners' concern (Br. 21) that the government might attempt to bring indictments without content or to try cases without coherent theories of guilt. Certainly this is not such a case.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1998

# APPENDIX

**United States Sentencing Guidelines**
**As amended to November 1, 1994**

**Chapter One - Introduction**
**And General Application Principles**

* * * * *

**Part B - General Application Principles**

* * * * *

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.



(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

*Commentary*

*Application Notes*:

* * * * *

2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

* * * * *

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

* * * * *

3. "Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as

used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21



U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

* * * * *

*Background*:

This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

* * * * *

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud

and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)



**Chapter Two - Offense Conduct**

* * * * *

**Part D - Offenses Involving Drugs**

* * * * *

**§2D1.1. <u>Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy</u>**

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import to export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26.**

(c) Drug Quantity Table [omitted]

* * * * *

*Commentary*

* * * * *



*Application Notes*:

* * * * *

12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (*e.g.*, sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing

the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

* * * * *

**§6A1.3. Resolution of Disputed Factors (Policy Statement)**

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.



*Commentary*

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) *cert. denied*, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia

of reliability to support its probable accuracy." *United States v. Marshall*, 519 F. Supp. 751 (E.D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978) *cert. denied*, 444 U.S. 1073 (1980). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971) *cert. denied*, 404 U.S. 1061 (1972).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

No. 96-8732



In The

# Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, KARL V. FORT,
REYNOLDS A. WINTERSMITH,
HORACE JOINER & JOSEPH TIDWELL,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

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## ARGUMENT

### I. PETITIONERS' CLAIM WOULD AFFECT THEIR SENTENCES

The government argues in its brief that the trial court would necessarily have to sentence Petitioners to precisely the same sentences even if Petitioners had only been convicted of a cocaine conspiracy. Brief of the United States at 8-9, 15, 18, 20, 33-34. It, therefore, urges this Court to affirm the convictions on the ground that the principle Petitioners seek to apply would not help any of them. The government is wrong both on statutory and United States Sentencing Guidelines Manual ("U.S.S.G." or "Guidelines") grounds.

#### A. Petitioners' Claim Would Affect Application Of The Statutory Maximum Penalty

The government initially asserts that the maximum statutory penalty that could be imposed on Petitioners is not affected in this case. Brief of the United States at 15. That assertion is only true, however, if this Court rejects Petitioners' argument on the merits. The government concedes that the conspiracy count of which Petitioners were convicted did not specify any threshold quantity of narcotics or cite to any subsection of 21 U.S.C. Section 841(b) ("Section 841"). Brief of the United States at 28. A narcotics distribution conspiracy of an unspecified quantity of either powder cocaine or cocaine base carries a maximum penalty of twenty years. 21 U.S.C. § 841(b)(1)(C). Thus, if Petitioners are correct that 21 U.S.C. Section 846 ("Section 846") requires a jury determination of the type and/or threshold quantity of the alleged controlled substance or that the Fifth Amendment Due Process clause requires notice of the maximum potential penalty before the onset of jeopardy, then this case implicates statutory maximum penalties. For example, Petitioners Fort and Wintersmith received life sentences and Petitioner Tidwell received a sentence of 252 months, all in excess of the twenty-year maximum permissible under the indictment. (J.A. 51, 89, 143).

Moreover, even if one focuses just on the type of drug, a statutory maximum issue remains that requires reversal or remand. In determining the statutory maximum, the sentencing court may only use the drug or drugs in the offense of conviction. After that determination, the sentencing court applies the Guidelines. As part of the Guidelines calculation, relevant conduct principles allow the inclusion of additional drugs or transactions. The court may not impose a sentence above the statutory maximum for the offense of conviction, regardless of the type or quantity of relevant conduct drugs. Here, the trial court incorrectly assumed that the verdict included both drugs; then it combined the quantities of both drugs to reach a maximum statutory penalty of life.[1] However, there was never a determination of the applicable statutory maximum under Section 841(b) if the offense of conviction only embraced powder cocaine.

The government's brief obscures this issue by inappropriately mixing statutory maximum apples with Guidelines oranges. The government contends that the amount of powder cocaine the court assigned to each Petitioner was sufficient to justify the statutory maximums they received. These powder cocaine amounts were arrived at, however, as part of the court's Guidelines calculation, not as part of the distinct statutory maximum calculation for the offense of conviction. In other words, the government asks this Court to *assume* that the trial court's Guidelines determination on the amount of powder cocaine it believed was related to the dual object conspiracy would necessarily have been the same as the

[1] Actually, the court made two errors that compounded the problem in this case. The first task for the court was to determine the statutory maximum for the offense of conviction. The second step was to complete the Guidelines inquiry, including relevant conduct. The court proceeded directly to the Guidelines inquiry, added up all the drugs (including relevant conduct), and concluded that the statutory maximum for the conspiracy was life. Thus, on this record, the court made no separate findings of the statutory maximum. (*E.g.*, J.A. 107).



amount of powder cocaine involved in the offense of conviction even if that conviction were understood to be a conspiracy to distribute only powder cocaine. While these statutory and Guidelines calculations for conspiracy cases are similar, they cannot be assumed to be identical. In the absence of particularized findings, therefore, the sentences may not stand.[2]

As an initial matter, the Guidelines *require* aggregation of drug amounts and types arising from various acts of distribution which are related in fixing the drug amount. U.S.S.G. § 2D1.1. The statutory maximum penalties, however, speak only of individual violations ("a violation . . . involving" a particular quantity of a specified controlled substance). 21 U.S.C. § 841(b)(1)(A). Moreover, Section 841(b) has no provision that permits the court to aggregate multiple types of drugs to determine the applicable statutory sentence. The statutory maximum applicable in a multiple drug case thus is not answerable by reference to the methodology applied under the Guidelines.

Furthermore, comparing the trial court's actual findings under the Guidelines for just two of the Petitioners reveals the very real possibility that different statutory maximums may have resulted if the trial court began the process with the understanding that the verdict was based only upon a powder cocaine conspiracy. After all, the sentencing court determined that Petitioner Fort was responsible for 24,000 grams of cocaine, half of which the court ruled was cocaine base, while concluding Petitioner Edwards was only responsible for 21 grams of cocaine, 14 of which the court ruled was cocaine base, even though both Petitioners were convicted of the identical charge of conspiracy, and even though the court's findings rested on a view that the conspiracy embraced both

[2] Thus, the vast differential in available punishment between cocaine and cocaine base (100 to 1) in itself provides a sufficient disparity to question whether the sentencing judge's determination regarding drug amounts setting forth the maximum penalty would have been different if he had looked at the conspiracy differently. Compare 21 U.S.C. § 841(b)(1)(A)(ii) and (iii).

objectives. If that kind of disparity can exist in examining the entire course of conduct that all the conspirators engaged in, could reasonably foresee, and arose out of a common scheme or plan or course of conduct, then surely the court's fact-finding done in the more narrowly circumscribed set of rules governing statutory attributable drug amounts might also be widely disparate.[3] No one knows what the sentencing court would have concluded regarding the statutory penalties if it were required to consider the offense of conviction as merely embracing a powder cocaine conspiracy; the sentencing court made no such findings at all regarding the statutory penalty and the government's assertion regarding what the court would have done is nothing more than dubious speculation.

### B. Petitioners' Claim Would Affect Application Of The Sentencing Guidelines

In addition to the difficulties with the statutory penalty analysis, application of the Guidelines themselves show the government is wrong in asserting that the sentencing court would be obligated to reach the same sentence even if the object of the charged conspiracy was only distribution of powder cocaine. The government's approach improperly eliminates the distinction between offense of conviction and relevant conduct under the Guidelines.

The first step in any Guidelines analysis, prior to the determination of relevant conduct, is to find the guideline that

---

[3] Assume, hypothetically, that defendant A is involved in only a powder cocaine conspiracy to distribute 1 kilogram of powder cocaine. The maximum sentence for this defendant would be forty years, even if the court found at sentencing that there were 4 more kilograms of relevant conduct powder cocaine. Five kilograms of powder cocaine under the statute would ordinarily trigger a life sentence but relevant conduct cannot increase the statutory maximum which remains at forty years. In this case, powder cocaine was attributed to each Petitioner by the court in its Guidelines calculations because it was related to the distribution of the cocaine base objective. (*E.g.*, J.A. 110-112). Without specific findings, there is too great a danger that Petitioners' maximums exceed the statutory limits for their offenses of conviction.



is "most applicable," not to the real conduct of the defendants as the government would suggest, but to the charged conduct which formed "the offense of conviction (*i.e.*, the offense conduct *charged in the count of the indictment or information of which the defendant was convicted*)." U.S.S.G. § 1B1.2(a) (emphasis added); *see also* U.S.S.G. Chapter 1, Part A, 4(a). Once the appropriate guideline is established, the sentencing court then goes on to address relevant conduct, *i.e.*, other criminal conduct that arose out of "the same course of conduct" or "common scheme or plan as the offense of conviction." U.S.S.G. §§ 1B1.2(b) and 1B1.3(a)(2). In making this determination, the offense of conviction continues to be the relevant reference point from which the relevant conduct can be assessed and the base offense level determined.

A conspiracy conviction embracing multiple objects is likely to include a broader scope of relevant conduct than would a conspiracy embracing just one objective. For example, a conspiracy that embraces an objective to rob a bank and launder money would likely reach out and include participants and financial transactions relating to the laundering of money, perhaps including offshore banks. A conspiracy embracing only a bank robbery, on the other hand, might be limited to just the proceeds of a particular bank robbery and the attendant harms caused by the robbery itself. Thus, the scope of relevant conduct under the Guidelines is narrowed by the scope of the original conspiratorial agreement (determined by reference to the offense of conviction). This analysis does not disappear when the two criminal objectives are distinct controlled substances. While conspiracies to distribute two separate drugs have conspiratorial objectives which are more similar in nature, under the Guidelines, the sentencing court's drug quantity findings must be guided by a proper consideration of the conspiratorial agreement, and that understanding produces often vastly different results. *Compare, e.g.*, U.S.S.G. § 1B1.3, Application Note 2, Commentary, Illustrations (c)(5), (c)(6), (c)(7) & (c)(8) ("[T]he scope of the jointly undertaken criminal activity . . . may depend upon whether, in the particular circumstances, the nature of the

offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.").

Moreover, the offense of conviction – as distinguished from relevant conduct – continues to have an impact on the Guideline range throughout the Guidelines determination of the adjusted offense level. For example, to receive a reduction for acceptance of responsibility, a defendant "is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction. . . . " U.S.S.G. § 3E1.1, Application Note 1(a). Whether the victim of a crime was vulnerable, requiring an upward adjustment, depends on the status of the victim of the offense of conviction and not on some other person who might have been victimized by relevant conduct. U.S.S.G. § 3A1.2, Application Note 1. The statutory penalty for the offense of conviction, in the case of a career offender, and not the relevant conduct guideline, sets the base offense level and determines whether a defendant serves ten years or twenty-five years of imprisonment. U.S.S.G. § 4B1.1. Therefore, a sentencing court must distinguish between the offense of conviction, relevant conduct that arises out of the offense of conviction, and any other criminal conduct that may be attributable to the defendant in connection with a different offense because those distinctions have profound implications on the ultimate sentencing guideline ranges imposed by the court.

Therefore, a proper application of the Guidelines requires more than a careful assessment of credibility and evidence. Here, the court failed to make three kinds of required findings. First, as discussed in Part I.A., *supra*, there is no record of what drug amounts of powder cocaine and cocaine base the court attributed to each Petitioner as part of the offense of conviction. In addition, however, the Guidelines calculations do not reflect whether any drugs (both type and quantity) for each Petitioner were included because they were relevant conduct or part of the offense of conviction. Moreover, if some amounts were included as relevant conduct, there are no findings as to which object of the conspiracy those drugs were assigned. Thus, the government cannot even assert that the



court necessarily would have reached the same Guidelines sentence for each Petitioner.

A few examples of how even the Guidelines sentences of Petitioners could have been affected are appropriate. First, the actual seizures of cocaine and cocaine base from some of the respective Petitioners were insignificant compared to the amounts ultimately attributed to them. For example, Petitioner Fort personally distributed not a single gram of powder cocaine or cocaine base during the entire conspiracy, and no drug purchases by undercover agents or drug seizures from his person or his residence ever occurred; yet testimony of cooperating codefendants and amounts seized from other persons resulted in a finding of 24,000 kilograms. (J.A. 73-75). Second, the testimony of the cooperating witnesses conflicted, sometimes directly, regarding the amounts of drugs sold by members of the conspiracy and by others during times of the conspiracy. (J.A. 78-81). Third, the district court discounted, sometimes by 90 and 100 percent, the testimony of these cooperating witnesses because of a lack of corrobcration or reliability of their drug quantity estimates. (J.A. 73-75, 77-79). Against this factual backdrop, the district court made assessments in credibility of various witnesses and weighed that evidence against other evidence toward the goal of making reasonable drug quantity findings. This assessment would likely have been severely impacted by assessing the criminal activity first from the perspective of a powder cocaine conspiracy only.

The single largest seizure of cocaine base in this case provides an illustration of this difficulty. On May 28, 1993, law enforcement officers seized one kilogram of cocaine base supplied to Gloria Holmes by Islander Willis. Neither Holmes nor Willis were indicted or unindicted co-conspirators in this case (Holmes was indicted, but not charged with the conspiracy). (J.A. 4-10, 110). The cocaine was found in Holmes' home. Gloria Holmes was the girlfriend of Montie Russell, who was an indicted co-defendant. Based on recorded telephone conversations between Montie Russell and Sam Tidwell at the time of the seizure and the testimony of another witness, Donald Box, the district court concluded that the

kilogram of cocaine was part of the cocaine base being distributed by "this conspiracy." (J.A. 110). Thus, the court held Petitioner Wintersmith accountable for that kilogram of cocaine base based on a finding that (1) he was involved in a cocaine base conspiracy, (2) Russell was involved in the same conspiracy, (3) Russell stored cocaine in his girlfriend's house, and (4) the seizure of cocaine base at the house belonged to Russell and to the conspiracy. If the court, however, had examined this activity as being outside of the conspiracy, the court would more likely than not have concluded that this cocaine base transaction either was not relevant conduct or was beyond the scope of the agreement Petitioner Wintersmith had joined. These types of factual findings are best made by the district courts; this case must be remanded to permit the district court to make these assessments. *See Koon v. United States*, 518 U.S. 81, ___, 116 S. Ct. 2035, 2047 (1996) ("District courts have an institutional advantage over appellate courts in making . . . determinations [based on departures from the Guidelines].").

## II. PETITIONERS' CONSTRUCTION OF THE STATUTE IS CORRECT, CONSISTENT, AND REASONABLE

Petitioners submit that the language of Section 846 mandates that the offense of conviction under this section must specify the identity of the drugs at issue. The government disagrees but fails to address or consider the actual language of Section 846 in its brief. The government also tries to show that Petitioners' construction of Section 846 would lead to various unpalatable consequences. In each case, the government is mistaken. In fact, it is the government's construction that leads to unacceptable consequences and cannot be squared with this Court's prior decisions.

### A. The Government's Reliance On The Structure Of Section 841 To Construe Section 846 Is Erroneous

Petitioners focused the Court on the terms of Section 846, the provision under which Petitioners were convicted



and sentenced. Petitioners showed a Section 846 conspiracy must incorporate an "offense" for which the underlying statutory provision – in this case Section 841 – "prescribe[s]" a penalty. In the case of Section 841, the underlying provision prescribes a penalty only for a specified type of drug, not for drugs in general. *See* Opening Brief at 11-13. The government ignores the actual language of Section 846. It chooses instead to rely on the language of *Section 841*. Pointing out that Section 841 has separate sections entitled "Unlawful Acts" and "Penalties," the government argues that *Section 846*, therefore, defines a single offense for any agreement to violate Section 841, regardless of the type of drug or any other threshold facts that prescribe the penalties under Section 841(b). *See* Brief of the United States at 22-25. This argument is clearly mistaken for several reasons.

Even if the government's construction of Section 841 were correct, it would be beside the point here because Petitioners were convicted of a *conspiracy* under *Section 846*. The government's argument simply ignores the distinct terms of Section 846. In fact, Congress had good reason to structure Section 846 to require a specification of the offense sufficient to determine the relevant range of penalties for each conspiracy. Legislators, courts, and commentators have long recognized the dangers inherent in broad and ill-defined conspiracy charges. *See, e.g., Dennis v. United States*, 384 U.S. 855, 860 (1966) ("Indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable."). Requiring that the object of the conspiracy be charged and proved with sufficient specificity is consistent with this recognition. In a Section 841 case, the charge and trial evidence would be limited to time, place, and number of incidents at issue. In a Section 846 case, in contrast, the case typically will encompass a broad expanse of time and numerous potential incidents in different places involving different people and different overt acts from which the government asks the jury to deduce the existence and scope of the charged conspiracy. Given the nature of

conspiracy charges and the vast differences in penalties attached to different kinds of drugs, it is perfectly sensible for Congress to define the offense to incorporate the identity of the drugs in each case. Indeed, as Petitioners explained in their Opening Brief, this construction of Section 846 is consistent with the courts' construction of the general conspiracy statute, 18 U.S.C. Section 371. *See* Opening Brief at 14-15. Thus, even if the Court accepts the government's premise that a Section 841 sentencing requires *no* specification of the drugs at issue in the charge and jury verdict, that conclusion need not – and, given the terms of the conspiracy statute, does not – apply to Section 846.

Most importantly, however, the government's reliance on the labels of Section 841(a) and Section 841(b) to make its case is patently defective in any event. First, subsection (b) of Section 841, although entitled "Penalties," clearly does define distinct elements of Section 841 crimes which the jury must find in deciding guilt, not the judge alone in setting the sentence. As the government itself concedes, proof of a "detectable amount" of drugs is clearly a necessary element of the crime of possession with intent to distribute under Section 841.[4] The term "detectable amount," however, appears *only* in Section 841(b), the subsection entitled "Penalties," *not* in Section 841(a). The government's concession that "detectable amount" – a requirement found only in the "Penalties" section of Section 841 – is an element of the offense directly defeats its central argument for construing Section 846 to require no jury determination of drug type.

Furthermore, the government fails to acknowledge that subsections (b)(5), (6), and (7) of Section 841(b) define distinct crimes (and therefore additional elements) by setting forth specific factual requirements which the jury must find before the court may impose the statutory penalties that each

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[4] *See* Brief of the United States (stating that "Section 841 itself does not require any jury determination of the type and quantity of drugs involved in a defendant's conduct (*other than a determination that it involved a detectable quantity of some controlled substance*)") (emphasis added); *see also United States v. McGeshick*, 41 F.3d 419 (9th Cir. 1994).



provides.[5] These sections also appear in the part of Section 841 entitled "Penalties," yet they also clearly define elements of the offenses in question.

Second, this Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), clearly dooms the argument the government relies upon here. In *Ratzlaf*, the Court addressed the anti-structuring provisions of the currency transactions reporting laws codified at 31 U.S.C. Section 5324.[6] The enforcement provision, 31 U.S.C. Section 5322 ("Section 5322"), is entitled "Criminal *penalties*" and provides that "[a] person willfully violating this subchapter . . . " shall be subject to certain punishments. Applying the government's canon of construction, the fact that the willfulness requirement appeared in a section entitled "Criminal penalties" should have demonstrated that Congress intended willfulness merely to be a sentencing threshold for the trial court to determine, not an element of the offense for the jury to decide. In *Ratzlaf*, the Court held that the willfulness requirement of Section 5322 requires that the jury find beyond a reasonable doubt that the defendant acted with knowledge that his conduct was illegal.[7] 510 U.S. at 139, 148. Thus, the fact that the identity of the drug appears in a provision entitled "Penalties" does not show Congress intended it be treated solely as a factor for the court at sentencing.

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[5] *See, e.g., United States v. Betz*, 82 F.3d 205, 205 (8th Cir. 1996) ("Defendant-appellant . . . was indicted . . . for knowingly manufacturing, culturing and harvesting marijuana plants on federal property in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B)(vii), and 841(b)(5).").

[6] Congress subsequently amended the statute. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253.

[7] The Seventh Circuit itself has followed the teaching of *Ratzlaf* in holding that the willfulness requirement for illegal dealing in firearms, which appears in a provision entitled "Penalties," also requires proof that the defendant violated a known legal duty as an element of the offense. *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994).

### B. The Government's Attacks On Petitioners' Construction Of Section 846 Are Incorrect

The government mistakenly attacks Petitioners' reading of Section 846 on the grounds that (a) it implies the *convictions* must be invalid, not just the sentences, and (b) it necessarily implies the indictment and verdict in Section 846 cases must include other facts that are necessary to prescribe a penalty under the various possible object offenses for a Section 846 conspiracy. These objections are incorrect.

Petitioners' argument does not necessarily imply that their convictions must be invalid because the jury verdict did not specify the drugs at issue. The ambiguity of the jury verdict does not render the convictions invalid because this Court has held that ambiguous, multiple-object conspiracy verdicts are permissible so long as each potential object of the charged conspiracy is legally valid standing alone. *Yates v. United States*, 354 U.S. 298 (1957). The circuit courts, whose approach Petitioners urge this Court to validate, have found that the ambiguity of the conspiracy verdict invalidates a sentence based on the most egregious of the multiple objects charged, but did not find the ambiguity necessarily invalidated the conviction.[8] In fact, this Court has already recognized precisely this distinction. This Court's plurality decision in *Schad v. Arizona*, 501 U.S. 624 (1991), expressly drew a distinction between the general verdict's effect on the validity of conviction in that case and its effect on sentencing. In *Schad*, the Court approved jury instructions which allowed the jury to return a verdict of conviction for capital murder

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[8] *See United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), *cert. denied sub nom. Joyce v. United States*, ___ U.S. ___, 116 S. Ct. 1556 (1996); *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 342 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Bounds*, 985 F.2d 188, 193 (5th Cir.), *cert. denied*, 510 U.S. 845 (1993); *United States v. Owens*, 904 F.2d 411, 414 (8th Cir. 1990); *United States v. Garcia*, 37 F.3d 1359, 1369-70 (9th Cir. 1994), *cert. denied*, 514 U.S. 1067 (1995); *Brown v. United States*, 299 F.2d 438, 440 (D.C. Cir.), *cert. denied sub nom. Thornton v. United States*, 370 U.S. 946 (1962).



without specifying whether the jurors unanimously found the defendant guilty of premeditated murder or of felony murder. The plurality observed that, under state law in that case, the penalty for both premeditated and felony murder authorized the same maximum penalty – death. *Id.* at 644 n.9. "Moreover," this Court reasoned, "the dissent's concern that a general verdict does not provide a sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision whether or not to impose the death penalty . . . goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction." *Id.*

The government also argues that Petitioners' argument suggests that the jury verdict in a Section 846 case must specify not only the identity of the drug at issue, but also other relevant statutory factors, before the trial court may sentence based on such factors. This objection, too, is misplaced.

First, the issue of whether the jury verdict must specify the threshold *quantity* of drugs under Section 841(b) is not itself before the Court in this case. Second, the government's argument is, in reality, no objection at all to Petitioners' construction. The government repeatedly exaggerates Petitioners' argument in this regard. Petitioners do not claim, for example, that the Section 846 verdict must specify the exact amount of a drug in order for the court to impose a sentence. Rather, the logical consequence of our argument is only that the indictment would have to provide notice of *threshold* amounts necessary to identify the nature of the conspiracy with sufficient specificity to predict the range of penalties. Because the jury normally receives the counts of the indictment, no changes on how the jury returns its verdict would be required. Moreover, the government's normal practice in many districts is to charge Section 846 conspiracies in exactly this manner, alleging either the identity and threshold quantity of the drug or by citing to a subsection of Section 841(b). There is nothing extraordinary or onerous in asking the government to charge and obtain a verdict on the essential,

threshold facts defining the Section 846 offense of conviction on which the court is to sentence.

Finally, however, the identity and the threshold quantity of drugs in a Section 846 conspiracy case can be easily distinguished. The context from which Section 846 and Section 841 arose confirms that Congress understood the identity of the drug to be an element of the offense on which the jury would return a verdict. Section 841 was enacted in 1970 to gather into one comprehensive provision the various distinct laws which Congress had enacted to address each kind of illegal drug. *See* Opening Brief at 18-19. Prior to 1970, the jury had to agree on the identity of the drug at issue in returning a conviction for the crimes that now are collected within Section 841. This history, and the fact that nothing in the legislative history or terms of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 ("1970 Act"), suggests that Congress intended to change the role of the jury in recodifying these regulations, confirm Petitioners' construction. The same cannot be said of drug quantity, however, because the various provisions prior to the 1970 Act did not contain differential maximum penalties depending on quantity. *See, e.g.*, Harrison Narcotic Drug Act, Ch. 1, 38 Stat. 785 (1914); Narcotic Drugs Import and Export Act of 1922, Ch. 202, 42 Stat. 596; Marijuana Tax Act of 1937, Ch. 553, 50 Stat. 551.[9]

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[9] The fact that Congress specifically separated consideration of prior convictions into a distinct section of the code, 21 U.S.C. § 851, and expressly dictated that the court would make findings as to prior convictions also *supports* Petitioners' view of drug identity as an element of the offense. Section 851 shows that, in the 1970 Act, Congress did consider whether to make a fact into a sentencing factor for the court alone and knew how to state its intention to do so. In contrast to prior convictions, Congress did *not* provide that drug identity would henceforth be treated only as a sentencing factor for the court.



### C. The Government's Reading Of Section 846 Contradicts Established Principles And Authorities

As Petitioners have shown in their Opening Brief, it is the government's construction of Section 846 that leads to conflicts and inconsistencies with existing principles which this Court and the lower courts have established in other cases. In summary, these conflicts and inconsistencies include the following:

1. The government's position here contradicts not only the long-established holdings of all the circuit courts that have addressed this issue prior to the present case, but it also contradicts the Seventh Circuit's opinion in this case below. All circuit courts which have addressed the question, except the Seventh Circuit below, agree that an ambiguous Section 846 verdict cannot support sentencing at the highest statutory maximum penalty where the government charged different possible objects that would clearly carry different statutory maxima. *See, e.g., United States v. Melvin*, 27 F.3d 710; *Orozco-Prada*, 732 F.2d at 1083-84; *Quicksey*, 525 F.2d at 342. Moreover, even the Seventh Circuit's opinion below agrees with the rule set forth in cases like *Brown v. United States*, 299 F.2d 438, and concedes that an ambiguous general verdict cannot support the highest maximum where the conspiracy charges as its objects two different statutory sections of the criminal code carrying different sentencing ranges. *United States v. Edwards*, 105 F.3d 1179, 1181 (7th Cir. 1997).

The government, however, concedes *neither* of these propositions, rejecting alike the holdings in cases such as *Brown* and the holdings in cases such as *Orozco-Prada*. Brief of the United States at 32. The government may recognize, as Petitioners contend, that the rules in cases such as *Brown* and cases such as *Orozco-Prada* rest on the same principles; that there is no persuasive way to accept *Brown* and reject *Orozco-Prada*; and that those same principles apply with equal force here as they do in cases such as *Brown* and *Orozco-Prada*, regardless of whether the identity of the drugs here would change the statutory maximum for any of the Petitioners. In

all these cases, the court does not have the statutory authority to sentence without an unambiguous jury verdict specifying the object of the conspiracy of which it found the defendants guilty. The government's position, therefore, cannot rationally be squared with the long-accepted principles first stated in *Brown* and carried forward in numerous circuit court decisions since that time.

2. The government's construction of Section 846 conflicts with the accepted construction of the general conspiracy statute, 18 U.S.C. Section 371 ("Section 371"), which uses the same language to define the object offense in a conspiracy. *See* Opening Brief at 14-15. For sentencing purposes, Section 371 distinguishes between conspiracies to commit felonies and conspiracies to commit misdemeanors, just as Section 846 distinguishes among different kinds and amounts of drugs. If the government obtained a general jury verdict on a charge of conspiring to commit either a felony or a misdemeanor, the court may not determine that the object was a felony in sentencing the defendant, but must instead assume that the offense of conviction was a conspiracy to commit a misdemeanor. *See, e.g., United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987). The government chose not to address this point in its brief. Petitioners submit that the government's position here is inconsistent with cases like *Scanzello* and would necessarily lead to the conclusion that the trial court, not the jury, could make the crucial determination as to the nature of such a Section 371 conspiracy in the sentencing process.

3. The government's construction of Section 846 also conflicts with the position it has successfully advanced in double jeopardy cases, holding that a defendant may be found guilty of multiple offenses under Section 841(a) for the simultaneous possession with intent to distribute different kinds of drugs because the possession of each different kind of drug constituted a distinct offense. *See* Opening Brief at 27 (citing cases). The government asserts that these double jeopardy cases are irrelevant because a Section 846 case normally charges a single conspiracy to commit *numerous* distinct



substantive offenses. Brief of the United States at 34-35. The government's response to this point is wholly unpersuasive.

The government's construction in response to the double jeopardy problem actually supports Petitioners' position. Petitioners maintain that the conspiracy charge in this case does allege a conspiracy to commit one or more of two distinct offenses, each offense being defined by the identity of the drug in question. It is precisely this fact that makes the jury's general verdict ambiguous. The government's fundamental argument is that the Section 846 count charges a conspiracy to commit a *single* crime – namely, a violation of Section 841(a) in general, in which the Section 841 object does not involve or require *any* specification of the drugs. *See* Brief of the United States at 22-25. This essential premise of the government's argument, that a Section 841 violation requires no identification of the drug at issue, clearly contradicts the position it has advanced in double jeopardy cases – that the type of drug is an element of the offense for which there can be multiple punishment.

4. The government's position is inconsistent with this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991). As Petitioners explained in their Opening Brief, the *Griffin* decision, and the line of cases *Griffin* addresses, simply make no sense on the government's construction of Section 846. *See* Opening Brief at 36-38. In effect, the government argues here that a conspiracy case – and there is no basis to distinguish Section 371 from Section 846 in this regard – simply charges a single crime that may be committed in multiple possible ways; the jury's sole function is to render a verdict on the single crime of conspiracy; and, where the government charges multiple objects, the jury need not agree on the objects it finds. If this were correct, the *Griffin* decision would make no sense, for the Court could simply have said, as the government says here, that the determination of which particular possible objects the defendants agreed to commit is just a sentencing function for the trial court. The government chose not to address this point in its brief. *See* Brief of the United States at 35-36.

5. In the Opening Brief, Petitioners argued that the lower court's opinion sanctions a form of indictment that provides insufficient notice of the maximum statutory penalty in violation of due process. In its brief, the government argues that the specifics in Petitioners' indictment "sufficiently identified the offense at issue to allow them to plead the indictment in bar in any subsequent prosecution for the same offense." In support, the government cites a line of cases that holds that indictments must apprise defendants of the nature of the accusations against them, sufficient for a double jeopardy review. Brief of the United States at 29. However, the government ignores the distinct line of due process cases cited by Petitioners that concern a defendant's right to notice of the severity of the potential punishment.[10] *See* Opening Brief at 39-40. It is this line of cases that is relevant to the issue before the Court.

Second, the government asserts that the notice issue is irrelevant to this case because the indictment "*did* identify the particular controlled substances that petitioners were charged with conspiring to possess and distribute." Brief of the United States at 28. True, Count One of the indictment did name two drugs, powder cocaine and cocaine base. However, as Petitioners argued in the Opening Brief and elsewhere in this Reply, the trial court's instructions permitted the jury to convict if they found either a cocaine base or powder cocaine conspiracy (or both). Therefore, as the case was actually submitted to the jury, the indictment ultimately failed to accurately notify Petitioners of the true statutory maximums they would face at the conclusion of the trial.

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[10] Elsewhere, the government has conceded that due process entitles a defendant to notice of the statutory maximum punishment. *See United States v. Carrozza*, 4 F.3d 70, 81 (1st Cir. 1993), *cert. denied* 511 U.S. 1069 (1994) ("We agree *with the government* that the statutory maximum sentence must be determined by the conduct alleged within the four corners of the indictment. Otherwise, a defendant would not know at the time of his arraignment or change of plea what his maximum sentence would be on the charged offenses.") (emphasis added).



The government further raises the specter that what Petitioners truly seek is "notice of the specific quantities of drugs" in the case that would require "pretrial access . . . evidence the government actually possesses . . . ". Brief of the United States at 29. These responses misunderstand both Petitioners' argument and the scope of the remedy it requires. Petitioners recognize that the clear import of this notice argument is that, in a conspiracy charging a Section 841 offense, the indictment should in some manner reflect the relevant penalty provision of Section 841(b) the government intends to prove at trial was the object of the conspiracy, and thereby establish the statutory sentencing maximum. Nevertheless, while it is not necessary for the Court to reach this issue for Petitioners to obtain relief, it is important to note that satisfying due process would not require the parade of pretrial discovery requests the government fears. Rather, consistent with the actual indictment practices in many districts, the government simply has to add the relevant subsection of Section 841(b) to a conspiracy count.

## CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court remand this case for resentencing or a new trial.

Dated: February 13, 1998

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No. 96-8732

In The

# Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, ET AL.

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

## BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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## QUESTION PRESENTED

Whether a defendant found guilty of a dual object narcotics conspiracy, based on a general jury verdict which does not disclose the object of the conspiracy of which the jury found the defendant guilty, must be sentenced on the basis of the criminal object carrying the lesser penalty or be given a new trial.

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## INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. One of the missions of NACDL is to ensure justice and due process for persons so accused. NACDL has over nine thousand members nationwide, and is affiliated with sixty-eight state and local criminal defense organizations, which have over twenty-eight thousand members. NACDL is the only national bar association devoted exclusively to the concerns of criminal defense lawyers.

Families Against Mandatory Minimums (FAMM) Foundation is a nonprofit, nonpartisan, educational organization that conducts research and advocacy regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has over 33,000 members nationwide with 30 chapters in 24 states and the District of Columbia. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae believes that, in deciding this case, the Court will necessarily address a question of substantial importance in federal criminal practice: whether the *type* of controlled substance is an essential element of a conspiracy charge under 21 U.S.C. §846. The answer to this question will implicate how federal conspiracy crimes are charged and submitted to a jury and how a judge may sentence if an individual is found guilty of such a conspiracy. Therefore, the Court's action in this case will impact upon both the type and nature of representation a person charged in such a conspiracy may receive, as well as what sentence such a person may face after guilty plea or verdict in the federal courts. For that reason, both NACDL and FAMM seek to address the interests of defendants who may not be situated precisely as the petitioners in this case, but who are affected by the Court's resolution of this issue. Both organizations believe that they are in unique positions to assist the Court in examining the important constitutional questions raised by this case.[2]

## STATEMENT OF THE CASE

### A. The Indictment.

Petitioners Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner and Joseph Tidwell were indicted under Indictment No. 93 CR 20024, filed July 27,

[2] Amicus has obtained consent to the filing of this consolidated brief in support of the petitioners from all interested parties. These letters of consent have been filed separately with the Clerk of this Court.



1993, by the grand jury sitting in the United States District Court for the Northern District of Illinois, Western Division. A superseding indictment was filed November 23, 1993, extending the time period referred to in Count One by one day and adding 11 additional counts. The superseding indictment comprises 26 counts, charging 20 defendants, variously, with a conspiracy to possess with intent to distribute, and to distribute, cocaine and cocaine base in violation of 21 U.S.C. §846; possession of cocaine and cocaine base with intent to distribute in violation of 21 U.S.C. §841(a)(1); use of a firearm during and in relation to drug trafficking in violation of 18 U.S.C. §924(c); and being felons in possession of a firearm in violation of 18 U.S.C. §922(g). Joint Appendix (hereinafter, "J.A.") at 1-11.

Count One, the pertinent count of the indictment, charged Petitioners Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell – as well as 14 others – with conspiracy to possess with intent to distribute, and conspiracy to distribute, cocaine and cocaine base over a period of time beginning in 1989 and continuing through July 1993. J. A. at 2-7. Count One of the indictment was six pages long with a total of 21 paragraphs. J. A. at 2-7. The first paragraph of Count One charged all fourteen petitioners conjunctively with conspiracy to distribute cocaine and cocaine base, Schedule II Narcotics, in violation of Title 21, U.S.C. §841(a)(1). J. A. at 2-3. The second paragraph of Count One charged each with profiting from illegal sales of large quantities of powder and crack cocaine by purchasing powder cocaine in kilogram and lesser quantities,

cooking the powder cocaine into crack cocaine, and selling both powder and crack cocaine at numerous distribution sites. J. A. at 3. Paragraph three of Count One alleged that it was a part of the conspiracy that the defendants obtained and attempted to obtain large quantities of cocaine in powder form from a variety of suppliers. *Id.* Thus, §846 crimes of conspiracy, related to violations of §841(a), were charged conjunctively in certain paragraphs of Count One and disjunctively in other paragraphs of the same count.[3]

**B. The Trial and the Verdict.**

Several defendants charged in the indictment pleaded guilty after submitting written plea agreements. All five petitioners before this Court asserted their constitutional right to trial by jury. Record (hereinafter "R") at 711-12. The five petitioners were tried together in a trial which commenced on June 27, 1994, in the United States District Court for the Northern District of Illinois. Evidence was presented during trial that supported a conviction for conspiracy to distribute powder cocaine or cocaine base. *United States v. Edwards* 105 F.3d 1179, 1180 (7th Cir. 1997). The evidence at trial demonstrated that the object of the conspiracy began as cocaine but shifted in early Spring 1992, to cocaine base. *See* Government's Brief on Appeal 8-9.

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[3] Counts Two, Four, Five and Six charged petitioners with various other offenses. The remaining counts of the indictment (Counts 3 and 7-26) charged offenses against parties who are not involved in this appeal.



Before submitting the case to the jury, the trial court instructed the jury "as a matter of law that cocaine and cocaine base are Schedule II Narcotic Drug Controlled Substances." Tr. 3040. Further, the jury was instructed that the Government need not prove an exact amount of cocaine or cocaine base was involved in the conspiracy but only that the conspiracy involved "measurable amounts of cocaine or cocaine base." Tr. 3040. The instructions provided to the jury on the conspiracy charge did not distinguish, either in the definition of conspiracy or in the requirements of the Government's proof, the cocaine conspiracy from the cocaine base conspiracy. Moreover, the court repeatedly emphasized that two different drugs were involved and that the jury could convict the defendants of the conspiracy if measurable amounts of *either drug* were involved since both substances were Schedule II Narcotic Drug Controlled Substances. Tr. 3040.

On July 18, 1994, the jury found all petitioners guilty of Count One of the indictment; petitioners Edwards and Wintersmith guilty of Count Four of the indictment; and petitioner Tidwell guilty of Counts Five and Six of the indictment. J. A. at 20-28.

Because there was no special verdict form or a special interrogatory with respect to this issue, the jury's finding regarding which object or objects of the conspiracy each defendant engaged in cannot be determined. As the Government previously conceded, the jury's general verdict of "guilty" on Count One could reflect its finding that the individual defendants solely possessed cocaine with

intent to distribute or solely possessed cocaine base with intent to distribute, or both.[4] J. A. at 20.

### C. The Sentencing

The district court sentenced all petitioners pursuant to the United States Sentencing Guidelines. The court used conspiracy to distribute cocaine base as the underlying offense of conviction applying the preponderance of the evidence as the standard of proof. J. A. at 43-49, 57-62. *See Edwards*, 105 F.3d at 1180.

## SUMMARY OF ARGUMENT

The crime of conspiracy is distinct from all other crimes in that the specific agreement between the parties is the required act which defines the offense. No conviction for conspiracy can stand without proof of such a specific agreement and no punishment, therefore, can follow the failure to prove such a specific agreement. Indeed, it is this requirement that keeps the law of conspiracy from slipping into unconstitutional vagueness and overbreadth. Because the law of conspiracy so often nears this line, it has long been understood that

[4] In the court below the government conceded that the trial court instruction empowered the jury to find the defendants guilty on Count One with mere proof on either object – cocaine or cocaine base. The government further conceded that this amounted to a dual object conspiracy. *See* Government's Brief on Appeal at 31.



"[c]onspiracy . . . [is] a darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

This necessary specific agreement element, in any conspiracy charged under 21 U.S.C. §846, requires pleading and proof of a specific object of the agreement. Under the plain language of this statute, and the plain language and structure of 21 U.S.C. §841, the necessary agreement element of the offense may be satisfied only by pleading and proof of a specific controlled substance rather than of some undefined generalized concept, "controlled substance."

In the instant case, this basic statutory and constitutional requirement was violated by allowing the jury to return a verdict on a charge which named two distinct objects, in the disjunctive, as the agreement element of the crime. An indictment which charges such a dual object conspiracy – or a jury charge which empowers a jury to convict for a dual object conspiracy – is unconstitutional. As the necessary element of a specific agreement is not present, there exists in this case no conviction upon which any sentence may be based.

To hold otherwise would greatly upset the foundations of criminal law, removing the protections of notice and trial by jury, and putting the fact-finding function in the combined hands of prosecutors and judges. Such a sea change in the law would certainly place in the prosecutors' nursery a new toy – previously unknown – that would never be put down.

## ARGUMENT

### THE SPECIFIC TYPE OF CONTROLLED SUBSTANCE IS A NECESSARY ELEMENT OF A CONSPIRACY CHARGED UNDER 21 U.S.C. §846.

Amicus believes, in order to resolve the issues presented in this case, the Court must necessarily reach the question whether a conspiracy, charged under 21 U.S.C. §846, requires pleading and proof of the specific controlled substance that is the subject of the conspiratorial agreement. The conclusion that such pleading and proof is required is supported by three compelling reasons. First, throughout history the laws of conspiracy have always required specific proof of the agreement between co-conspirators as the necessary act element. This historical requirement is confirmed by the plain language of the statutes that comprise the conspiracy offense in the instant case. Finally, any other reading of the statutes – such as the loose interpretation by the court below – would pose serious threats to the primary constitutional protections of right to notice and right to trial by jury.

### I

### THE HISTORY OF THE LAW OF CONSPIRACY REQUIRES SPECIFIC PLEADING AND PROOF ON THE ELEMENT OF THE AGREEMENT BETWEEN CONSPIRATORS

In our common law tradition, the crime of conspiracy has existed as a separate substantive crime since the seventeenth century. *See, e.g., Starling's Case,* 82 Eng. Rep.



1039 (1664).[5] That tradition has long held that an agreement as to the object of the conspiracy, and the means to obtain that object, is an essential element of the crime.

The first important English common law statement regarding conspiracy law came in the beginning of that century in *Poulterers' Case,* 77 Eng. Rep. 813 (1611). The English Court of Star Chamber in *Poulterers' Case* held that a conspiracy need not be wholly successful to sustain a conviction because the act of formulating the agreement was separate from the substantive criminal act.[6] *Id.* at 813. That court determined that the crime of conspiracy lay in the unlawful agreement itself rather than in its criminal execution. *Id.* at 813-14. This development signaled the beginning of the common law courts' view of conspiracy as a separate crime punishable even if the agreed act was not completed.[7]

The common law recognized two types of agreement that would constitute a criminal conspiracy: agreements to perform an unlawful act and agreements to perform a lawful act by unlawful means. *Rex v. Jones,* 110 Eng. Rep.

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[5] For detailed accounts of the development of the law of conspiracy, *see generally* B. Pollack, *Common Law Conspiracy,* 35 GEO.L.J. 328 (1947); F. Sayre, *Criminal Conspiracy,* 35 HARV.L.REV. 393 (1922).

[6] The defendants had combined to falsely accuse an individual of robbery, but because it was clearly evident from the facts that the accused was innocent, the grand jury did not indict the alleged thief.

[7] *See generally* K. David, *The Movement Towards Statute-Based Conspiracy Law In The United Kingdom and The United States,* 25 VAND. J. TRANSNAT'L L. 951 (1993). *See also, Development in the Law – Criminal Conspiracy,* 72 HARV.L.REV. 920, 922 (1959).

485, 487 (1832); *see also Rex v. Journeymen Taylors of Cambridge*, 88 Eng. Rep. 9, 10 (1721) ("a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it"). This requirement of an agreement to either act illegally or act towards an illegal end – or both – has been the *sine qua non* of criminal conspiracy law.

American courts in the federal and state systems have followed the common law understanding of conspiracy. *See Commonwealth v. Hunt*, 45 Mass. (1 Met.) 111, 121-22 (1842); *Pettibone v. United States*, 148 U.S. 197, 203 (1893) (at common law conspiracy is defined as a combination formed to do either an unlawful act or a lawful act by unlawful means).[8] This common law understanding of the agreement element requirement of conspiracy prosecutions has not changed in this century. *See Braverman v. United States*, 317 U.S. 49, 53 (1942) (analysis of the crime of conspiracy is centered on the agreement). Indeed, this Court has this Term reaffirmed that the object of the agreement is the critical element in a conspiracy prosecution. *See Salinas v. United States*, ___ U.S. ___, No. 96-738, 1997 WL 737692 (U.S. Dec. 2, 1997).

In *Salinas*, this Court held that "the partners in the criminal plan must agree to pursue the same criminal objective. . . . " *Id.* at ___, 1997 WL 737692 at *8; *see also*

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[8] *See Deacon v. United States*, 124 F.2d 352, 357-58 (1st Cir. 1941) (discussing early nineteenth-century common law definitions of conspiracy).



*Pinkerton v. United States*, 328 U.S. 640, 646 (1946).[9] The Court further held in *Salinas* that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at *9.

Although this Court has always recognized that, properly formulated, conspiratorial agreements may be the proper subject of a prosecution, this Court has also regularly noted the thin ice of constitutionality upon which the law of conspiracy skates. In the seminal case, *Krulewitch v. United States*, 336 U.S. 440, 445-451 (1949), Justice Jackson wrote that there is a place for conspiracy prosecutions in the United States legal system in spite of the fact that it is "elastic, sprawling, and pervasive . . . [and a] loose practice" that poses "serious threat to the fairness in our administration of justice." This Court reversed Krulewitch's conviction of violating the White Slave Traffic Act and of conspiring to violate the Act. *Id.* at 445. Concurring in the judgement and opinion of the Court, Justice Jackson stated that "[t]he modern crime of conspiracy is so vague that it almost defies definition." *Id.* at 446. Likewise, Judge Learned Hand, while sitting on the Second Circuit Court of Appeals, commented:

> So many prosecutors seek to sweep within the dragnet of conspiracy all those who have been

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[9] In *Salinas*, the defendant was convicted under the RICO Act, 18 U.S.C. §1962, of conspiracy and bribery in connection with permitting contact visits to federal prisoners incarcerated in county jail.

> associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

*United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940).

What this history confirms is that the nature of the specific agreement between conspirators is the only constitutional basis upon which a conviction may stand. Any lesser requirement than proof of a specific agreement allows conspiracy law to slip from a valid and constitutional crime into the unregulated tool of prosecutorial and judicial punishments feared by Justice Jackson and Judge Hand.

## II

## THE PLAIN LANGUAGE OF 21 U.S.C. §846 MUST BE READ IN LIGHT OF THIS COMMON LAW AND CONSTITUTIONAL HISTORY

The critical dispute in this case is whether the object of a §846 conspiracy may concern an undefined and general "controlled substance" or whether the type of controlled substance must be specifically pleaded and proved. Section 846 conspiracies are punishable only if the object of the agreement, if completed, would constitute a violation of certain Title 21 offenses:

> [A]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.



The plain language of this statute, in light of the history of conspiracy law, could not be more obvious: The object of the agreement which necessarily forms the basis of the conspiracy can be defined only by what is punishable under statute. Put another way, a punishable offense under Title 21 provides the only object for which defendants may be convicted for conspiracy.

In the instant case, the Petitioners could be convicted only if they were proved to have agreed to engage in specific conduct regarding a specific drug that is deemed punishable pursuant to 21 U.S.C. §841. In relevant part, that statute states "it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. §841(a). Section 841(b) of the statute prescribes the terms of incarceration for persons who violate §841(a). All of the enumerated punishments in §841(b) are tied to specific types of controlled substances. The statute thus establishes a scheme where the *punishment* for the crime is entirely dependent on the *type* of the controlled substance at issue.

Because §846 identifies the conspiratorial crime only by what is punishable, the indictment must specify the particular "controlled substance" punished by §841(b). It is possible that one who agrees or conspires to "manufacture, etc." more than one type of controlled substance may be involved in two distinct conspiracies with two distinct objects. *See, e.g., United States v. Richardson*, 86 F.3d 1537 (10th Cir. 1996) (conspiracy to possess with intent to distribute methamphetamine and cocaine held

to be two conspiracies with two distinct objects). However, it is the prosecutor who has the power and the duty to adequately charge and prove such a double conspiracy. By the plain language of the statute, as read in light of the history of conspiracy law, determination of the punishable object of such a conspiracy cannot be left to the sentencing judge loosed from the constitutional rights of trial by jury and proof beyond a reasonable doubt.

That §846 requires proof of an agreement about a specific type of controlled substance is further supported by the simple fact that there is no punishment in §846 for a "controlled substance" *qua* "controlled substance." It cannot be credibly argued that there exists any punishment for the crime of possession of a controlled substance, without more, because there is no statutorily prescribed penalty for such a charge. Likewise, there is no statutorily prescribed punishment for the conspiracy to "manufacture, etc." controlled substances without more specific pleading or proof. The specific penalties prescribed in §841(b) relate to very specific offenses; there is no mention in the statutes of any punishment range for distribution of a "controlled substance." The absence of any punishment regimen for a conspiracy regarding a controlled substance without reference to a drug-specific punishment from §841 indicates the necessity of pleading and proof on a particular controlled substance, not just controlled substances generically.

This requirement – that a particular controlled substance be pleaded and proved for a valid §846 conspiracy prosecution – is further supported by this Court's analysis in *Albernaz v. United States*, 450 U.S. 333 (1981). In that case, this Court held that Congress permissibly



intended to allow imposition of consecutive sentences for offenses arising out of a single agreement or conspiracy having dual objectives. In *Albernaz*, the defendants were involved in an agreement to import marijuana and then to distribute it domestically. They were convicted of violating 21 U.S.C. §§846 (conspiracy to distribute) and 963 (conspiracy to import), and sentenced consecutively on each count. In determining whether Congress was permitted to authorize cumulative punishments, this Court applied the double jeopardy analysis announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932).[10] The Court held that the statutory provisions, which were the basis of the conspiracies charged in *Albernaz*, specified different ends as the proscribed object of the conspiracy – "distribution" *versus* "importation" – clearly satisfying the *Blockburger* test.[11]

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[10] In the application of that double jeopardy standard, the Court noted "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

[11] This Court employed a similar rationale in *United States v. Broce*, 488 U.S. 563 (1989). In *Broce* the defendants pleaded guilty to two conspiracy counts and later, at sentencing, contended that only one conspiracy existed, thereby implicating double jeopardy principles that required the conviction and sentence on the second count be set aside. *Id.* at 565. However, this Court upheld the sentences stating that if "a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.* at 570.

As in *Albernaz*, the charge in the instant case is a dual object conspiracy with two different objectives: one to distribute cocaine and one to distribute cocaine base. In applying the *Blockburger* rule to determine whether there had been the commission of two separate offenses, it must be determined whether each offense requires proof of a fact which the other does not. In proving whether conspiracy to distribute cocaine versus conspiracy to distribute cocaine base has been committed, the Government must prove a separate element in each offense, namely, the type of drug which is the object of the agreement. It is incumbent upon the Government to prove beyond a reasonable doubt that the object of one agreement was cocaine and to further prove that the object of the second agreement was cocaine base. Each of these offenses requires proof of a fact which the other does not: proof that cocaine was the object of the agreement in one instance and cocaine base in the other.

There can be little doubt that two conspiracies, one charging intent to distribute powder cocaine and one charging intent to distribute cocaine base would be treated identically to the statutes in *Albernaz* – Congress could, under a *Blockburger* analysis, prescribe consecutive punishments for the two conspiracies. This would be true even if, as in *Albernaz*, the proof of the two conspiracies was fundamentally the same, as the Government would be required to prove beyond a reasonable doubt *each type* of cocaine involved in each conspiracy.

There is no dispute that under the plain language of the statute, cocaine and cocaine base are distinct and separate controlled substances. *Compare* 21 U.S.C. §841(b)(1)(A)(ii) (cocaine), *with* §841(b)(1)(A)(iii) (cocaine



base). When the Government alleges a conspiracy to possess with intent to distribute cocaine base, it necessarily must prove that some quantity of cocaine base was involved in order to proceed to the harsher punishments established for that drug. *Id.* (a minimum ten year prison term is mandated for crimes involving five kilograms of cocaine powder or only fifty grams of cocaine base). The Government's proof at the guilt-innocence phase of a trial involving a conspiracy under §846 must be different when the allegation is cocaine base as compared to when the allegation is cocaine powder. The proof needed at trial, therefore, is different for the two controlled substances. *See, e.g., United States v. Lewis*, 113 F.3d 487, 492 (3rd Cir. 1997) (*cert. pending*) ("[l]aboratory analysis established that the controlled substance involved was cocaine base"). Thus, if the Government charged two conspiracies in separate counts – one for cocaine powder and one for cocaine base – findings of guilty would constitute separate and distinct violations of the law.[12]

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[12] This distinction is confirmed by the federal drug-possession statute, 21 U.S.C. §844. Section 844 specifically isolates cocaine base as a drug that, possessed in certain quantities, requires a completely different sentence than simple possession of powder cocaine. Thus, the criminal statutes establish a scheme where cocaine powder and cocaine base are explicitly differentiated.

Several courts of appeal have held that this statutory scheme isolates possession of cocaine base as a distinct violation of the law for purposes of §844. In *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994), the defendant was arrested and charged with a violation of §841. In addition, the trial judge allowed submission of a jury charge of simple possession under §844 as a lesser included offense. In holding that cocaine base was a distinct element of a §844 offense, the court of appeals reasoned

Because powder cocaine and cocaine base are different drugs, an agreement to possess with intent to distribute powder cocaine has as its object a fundamentally different underlying offense than an agreement to possess with intent to distribute cocaine base. Thus, for one to be sentenced under the provisions for powder cocaine, he or she must be found guilty of a measurable quantity of powder cocaine before additional relevant conduct even becomes an issue. *See* 21 U.S.C. §841(b) (terms for sentencing §841 convictions); *see also United States v. Booker*, 70 F.3d 488, 490 n.2 (7th Cir. 1995) (for purposes of sentencing guidelines and for statutory punishment, cocaine and cocaine base are different). For cocaine base sentencing provisions to apply, measurable quantities of cocaine base must be proven at the guilt-innocence phase. *Id.* Alleging violations of either drug, therefore, is an allegation of a separate object. Merely joining the two types of drugs under one conspiracy count does not change the statutory reality that the objects of such an underlying agreement are fundamentally different. *See, e.g., United States v. Richardson*, 86 F.3d 1537, 1553 (10th

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that the indictment clause of the Fifth Amendment necessitated a grand jury indictment. *Id.* at 145. Because a necessary statutory element – cocaine base – was not charged in the indictment, the defendant's sentence for the §844 offense which dealt specifically with possession of cocaine base could not stand. *Id.* at 152. Three other circuits have also held that simple possession of cocaine base is a separate and distinct element of §844. *See, e.g., United States v. Puryear*, 940 F.2d 602 (10th Cir. 1991); *United States v. Michael*, 10 F.3d 838 (D.C. Cir. 1993); and *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993); *but see United States v. Butler*, 74 F.3d 916 (9th Cir. 1996) (holding that simple possession of cocaine base is not a separate crime under §844).



Cir. 1996) (indictment alleging "methamphetamine and cocaine" alleged two separate offenses); *United States v. Dennis*, 786 F.2d 1029, 1041 (11th Cir. 1986) (conspiracy charging heroin/cocaine trafficking was a dual object conspiracy); and *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir. 1984) (conspiracy alleging distribution of "cocaine and marijuana" was a dual object conspiracy). Because cocaine and cocaine base are different objects of a §846 conspiracy, the type of cocaine involved is an essential element of a §846 offense.

## III

## IN LIGHT OF HISTORY AND THE PLAIN STATUTORY LANGUAGE, THE COURT BELOW ERRED IN REMOVING THE TYPE OF DRUG FROM THE PROTECTIONS OF TRIAL BY JURY AND THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Contrary to the weight of tradition and the plain language of the statutes implicated in this case, the court below usurped the power to determine the essential element of what object comprised the conspiratorial agreement:

> [T]here is no problem when the instructions are phrased in the disjunctive because . . . as long as the jury finds that the defendants conspired to distribute *any* drug proscribed by §841(a)(1), the judge possesses the power to determine which drug, and how much.

*Edwards*, 105 F.3d at 1182 (emphasis original). Contrary to the lower court's statement of the power of a single judge, the question of the type of controlled substance which is the object of the conspiratorial agreement must

be left in the hands of the jury. Any other holding would seriously undermine the constitutional protections afforded individuals charged with crimes in the Fifth and Sixth Amendments to the United States Constitution.

The Government has the power to define the scope of any conspiracy through its indictment. *See Garrett v. United States*, 471 U.S. 773, 798 (1985) (O'Connor, J. concurring). The shields to this prosecutorial sword are the constitutional guarantees of due process, the right to be informed of the nature and cause of the accusation brought by the Government and the right to trial by jury of such accusations. U.S. CONST. amends V, VI. As discussed above, in a criminal conspiracy the specific agreement itself is the actus reas element. *See United States v. Shabani*, 513 U.S. 10 (1994). The object of such agreement must be specifically stated in the indictment either in the conjunctive or charged as separate elements in separate counts of the indictment. Any disjunctive pleading under §846 – or disjunctive instruction to the jury – which states that there are two or more potential objects of the conspiracy simply does not comport with the minimal requirements of the Fifth and Sixth Amendments to the United States Constitution.

This conclusion is reached through two equally important constitutional channels. First, an indictment which does not give sufficient notice to the person charged of the crime or potential punishment he or she faces is fundamentally defective. Second, any jury charge based on such an indictment is defective if it empowers a jury to convict even where the Government has failed to prove beyond a reasonable doubt a critical element of the conspiracy offense.



**A. The Requirement of Notice**

It has long been understood that the constitutional right to notice of the Government's accusations – through indictment – has two separate functions. As this Court stated in *Russell v. United States*, 369 U.S. 749, 763 (1962), two of the criteria by which the sufficiency of an indictment is to be measured are "first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprizes the defendant of what he must be prepared to meet," and secondly, "in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Id.* (quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290 (1895)); *see also Rosen v. United States*, 161 U.S. 29, 34 (1896); *Hagner v. United States*, 285 U.S. 427, 431 (1932). An indictment which charges a dual object conspiracy to distribute cocaine or cocaine base does not sufficiently notify an accused of the crime for which he or she may be potentially punished, nor does it assist one in determining the crime for which he or she may not again be put in jeopardy.

As discussed above, the plain language of §846, as well as the history of conspiracy law generally, require the government in all instances to identify the particular type of controlled substance in order to validly charge an offense. In the instant case, the Government decided to seek a grand jury indictment naming *two* specific controlled substances. This charging decision prevented it from seeking a conviction on a different, uncharged and unpunishable, conspiracy to distribute controlled substances generally.

The Court's decision in *Stirone v. United States*, 361 U.S. 212 (1960) is instructive in this regard. The defendant in *Stirone* was charged with interfering with interstate commerce through violations of the Hobbs Act. 361 U.S. at 213-14. The indictment had alleged violations of the Hobbs Act by interfering with the flow of sand and other materials to manufacture concrete; the evidence admitted at trial, however, showed a violation through interference with the flow of steel shipments in interstate commerce. *Id.* This Court held that the conviction could not stand because "it was error to submit that question [concerning steel] to the jury and that the error cannot be dismissed as merely an insignificant variance between allegations and proof. . . . " *Id.* at 215. The trial court's actions resulted in a constructive amendment and thus constituted a Fifth Amendment violation. *Id. See also United States v. Leichtnam*, 948 F.2d 370, 379-80 (7th Cir. 1991) (conviction in a §924(c) count premised on an indictment which identified the use and carrying of a specific identified firearm, cannot be supported on the possession of a different firearm without violating *Stirone*); *United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990) (RICO conspiracy indictment identifying the RICO enterprise as the "DeCavalcante Family" required the government to prove that specific enterprise); *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986) ("[t]he government through its ability to craft indictments, is master of the scope of the charged RICO conspiracy . . . having set the stage, the government must be satisfied with the limits of its creation").

The indictment here alleged a §846 conspiracy by identifying two distinct controlled substances – powder



cocaine and cocaine base. After testimony, the jury was instructed that in order to convict it need only find petitioners guilty as to either powder cocaine or cocaine base. The court below concluded that the dual object nature of the charge was irrelevant as the actual conspiracy was related to a broader element, namely a "controlled substance." *Id.* at 1182. This reasoning by the Seventh Circuit constituted a constructive amendment because there were in fact two separate and distinct objects that must have been pleaded and proved to the jury beyond a reasonable doubt. Thus, the Seventh Circuit's holding is in conflict with this Court's holding in *Stirone*.[13]

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[13] This result is also supported by the Government's position in the lower courts regarding guilty pleas to dual object conspiracies. The Government has, in dual object conspiracy cases in which a defendant pleads to an indictment alleging a violation of possessing with intent to distribute cocaine *and* cocaine base, sought a sentence under the provisions for cocaine base, even though a defendant was not aware that he or she was potentially pleading guilty to the offense with the harsher punishment. *See, e.g., United States v. Bush*, 70 F.3d 557, 559 (10th Cir. 1995) (Government sought sentence under provisions for cocaine base where plea was to a conspiracy to distribute powder cocaine and/or cocaine base). The court in *Bush* stated that "if a guilty plea or verdict is ambiguous regarding the object of a conspiracy, the appropriate remedy is to remand the case to the district court with directions to hold a hearing and make a finding as to the object of the conspiracy." *Id.* at 561; *but see United States v. McCaskey*, 9 F.3d 368, 371 (5th Cir. 1993) (court sentenced defendants on the "relevant conduct" that involved cocaine base after defendants pleaded guilty only to conspiracy to distribute cocaine powder).

## B. The Requirements of Jury Decision and Jury Unanimity

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). This Court has held, in *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *See also United States v. Gaudin*, 515 U.S. 506, 510 (1995).

"The right to a jury trial includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Patterson v. New York*, 432 U.S. 197, 206 (1977); *In re Winship*, 397 U.S. 358, 361 (1970). The ultimate test of "the constitutional validity of any device [indictment charging a dual-object conspiracy] in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, . . . to find the ultimate facts beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 515 (1995); *see also County Court of Ulster City v. Allen*, 442 U.S. 140, 156 (1979).

The petitioners in the instant case were convicted of being involved in an agreement, the objective of which was two different ends: (1) to possess with intent to distribute and to distribute cocaine and (2) to possess with intent to distribute and to distribute cocaine base.



This Court has held that, "[w]hen [there exists] a single agreement to commit one or more substantive crimes . . . the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects." *Braverman v. United States*, 317 U.S. 49, 53-55 (1942). In *Braverman*, the single agreement with many different objectives was charged under one conspiracy statute. The Government argued that a defendant found guilty of one conspiracy that comprised several objects should be sentenced as if he were found guilty of each of those offenses. *Id.* at 51. This Court disagreed and held "the single agreement is the prohibited conspiracy. . . . For such a violation only the single penalty prescribed by the statute can be imposed." *Id.* at 54.

In the instant case, as in *Braverman*, a single conspiracy was charged that included as objects separate statutory offenses. However, in the case before the Court, unlike *Braverman*, the distinct objects were submitted to the jury in the disjunctive rather than the conjunctive. *See id.* at 50 n.1. Further, in the instant case, unlike *Braverman* in which each object carried the same statutory punishment, each object carries very different punishments: under §841(b), the statutory minimum sentence for a given quantity of "cocaine base" is 100 times that for "cocaine." *See, e.g., United States v. Booker*, 70 F.3d 488, 489 (7th Cir. 1995) (defendant held accountable for 500 grams to 1.5 kilograms of cocaine base giving him a base level of 36; in comparison, level 36 is applied to offenses involving 50 kilograms but less than 150 kilograms of cocaine). Therefore, under the principle of *Braverman* that the agreement is the essential element of the conspiracy, and

because under §846 the determination of whether the object of the agreement charged was cocaine or cocaine base is the fundamental question of fact for the jury to decide, the Government was required to plead and prove to the jury one of the two specific objects for conviction or sentence to stand.[14]

In the federal criminal system, courts have consistently held that essential elements of the crimes charged must not only be decided by a jury, but must further be decided by unanimous verdict. *See Andres v. United States*, 333 U.S. 740, 748-49 (1948); Fed. R. Crim. P. 31(a); *see also Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J. concurring) (defendants in federal courts entitled to unanimous verdict).

Charging a jury that proof of either of two separate elements may stand as the basis for a conviction, as was done in this case, further implicates the problem of equipoise – six jurors may have been convinced that the prosecution had proved that the conspiracy only involved cocaine powder while the other six may have been convinced that the proof supported conviction of a conspiracy regarding cocaine base alone. Such a jury would not have agreed unanimously that the Government proved beyond a reasonable doubt the necessary

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[14] Amicus contends that any conviction on a disjunctive dual object conspiracy is void and therefore any sentence based on such a conviction is likewise void. Even if this result is not dictated, however, the structure of the United States Sentencing Guidelines would likewise preclude sentencing as the charge of conviction must be determined before the sentencing determination may begin. *See* U.S.S.G. 1B1.2.



object of the conspiracy. As noted above, the court below would accept this lack of a final verdict and snatch the power of final decision for itself. *See Edwards*, 105 F.3d at 1182 ("as long as the jury finds that the defendants conspired to distribute *any* drug . . . , the judge possesses the power to determine which drug and how much") (emphasis original).

Such a broad reading of the power of the Government to charge and of the courts to decide has serious implications for the future of criminal prosecutions in this country. Under the lower court's rationale, in the conspiracy context there need be only the general charge of "crime" which will be charged by the government and determined by the judge without notice or opportunity to defend and without the primary protection of trial by jury of all elements beyond a reasonable doubt. In short, the conclusion urged by the lower court defies history, the plain language of the statutes and would eviscerate several provisions of the Fifth and Sixth Amendments to the United States Constitution. Therefore, the lower court's holding must be reversed and the petitioners retried under a sufficiently charged indictment before an appropriately charged jury.

## CONCLUSION

Conspiracy crimes are defined by the specific agreement of the conspirators. This fundamental principle of this unique crime has been understood by courts in our legal tradition for nearly four hundred years. The constitutional requirements of adequate pleading and proof are all that prevents the law of conspiracy from slipping into an unregulated and general punishment scheme.

In the instant case, the plain language of the statutory conspiracy crime, viewed in light of tradition and the constraints of the Constitution, requires that the specific type of controlled substance, which is the necessary object of the agreement, be pleaded and proved before any conviction may be deemed valid. Thus, any indictment alleging a §846 conspiracy must plead with specificity which controlled substance is the object of the agreement and a jury must be empowered only to return a verdict on such a specifically charged offense. Any other conclusion would fundamentally disrupt the careful balance between the powers of the Government and the protections afforded the people that it seeks to punish.

Respectfully submitted,

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